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# MYTH AND REALITY IN PROTECTIVE ORDER LITIGATION\*

*Richard L. Marcus†*

Judges and commentators have roundly condemned the current “boom” in federal civil litigation and the attendant “crisis” in discovery.<sup>1</sup> These developments threaten to undermine the central goal of the Federal Rules of Civil Procedure articulated in rule 1—“to secure the just, speedy, and inexpensive determination of every action.”<sup>2</sup> In 1979, the Supreme Court observed that “the discovery provisions . . . are subject to the injunction of Rule 1.”<sup>3</sup> Further invoking rule 1 concerns, the Court recently declared general deterrence a legitimate objective for discovery sanctions.<sup>4</sup> In the same vein, lower courts and litigants have come to rely on protective orders that limit the disclosure of information obtained through discovery to speed up the discovery process and minimize discovery disputes. Particularly in complex litigation, these orders have become an accepted part of the civil litigation landscape.

Under rule 26(c), a court may, on the motion of any party or person being deposed, enter a protective order to “protect a party or person from annoyance, embarrassment, oppression, or undue burden of ex-

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<sup>1</sup> The literature on the litigation boom and the discovery crisis is rapidly becoming voluminous. See Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. B. FOUND. RESEARCH J. 875; Kirkham, *Problems of Complex Civil Litigation*, 83 F.R.D. 497 (1979); Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981); Pollack, *Discovery—Its Abuse and Correction*, 80 F.R.D. 219 (1978); Rosenberg & King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 B.Y.U. L. REV. 579; Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 JUDICATURE 400 (1978). This phenomenon is receiving increasing public attention. See, e.g., *Burger Says Growing Caseloads Peril Court System*, N.Y. Times, Nov. 19, 1982, at B1, col. 1 (national ed.).

<sup>2</sup> FED. R. CIV. P. 1; see *Foman v. Davis*, 371 U.S. 178, 181-82 (1962). See generally 4 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1029 (1969) (primary purpose of rules is to promote justice).

<sup>3</sup> *Herbert v. Lando*, 441 U.S. 153, 177 (1979).

<sup>4</sup> See *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976); see also Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033, 1033-35, 1044-45 (1978) (arguing that threat to rule 1 interests explains courts' willingness to expand availability of sanctions).

pense" upon a showing of "good cause."<sup>5</sup> The good cause standard gives courts very broad discretion to tailor protective provisions to fit the needs of the case.<sup>6</sup> Using this discretion, courts have regularly entered protective orders not only to protect trade secrets,<sup>7</sup> but also to avoid other undesirable consequences such as the invasion of the litigants' privacy.<sup>8</sup> Thus, even though the protective order movant bears the burden of justifying the motion, courts have retained sufficient flexibility under the good cause standard to identify the circumstances that warrant judicially imposed restrictions on the use of discovered information. Because most protective orders are entered by stipulation rather than on motion,<sup>9</sup> both courts and litigants are freed from the burden of litigating such issues. Consequently, protective orders save countless hours of judicial time and substantial litigation costs. Thus are rule 1 interests served.

This commendable reality is threatened by a series of decisions based on an amalgam of common law and first amendment principles that require litigation of protective order issues and deprive protective orders, particularly those entered by stipulations, of their reliability. These decisions start with the premise that discovery is intrinsically public unless closed by court order, an assumption these courts use to justify invoking the common law and first amendment rights of the public to attend judicial proceedings. They reason further that the Federal Rules of Civil Procedure contemplate that all information garnered through discovery is presumptively available for any use not expressly forbidden by the court. This assumption provides a foundation for their endorsement of the litigants' first amendment rights to disclose material garnered through discovery. These courts hold that application of these principles in the aggregate requires strict limitations on the availability of protective orders. Thus may rule 1 interests be frustrated. This article argues for rejection of this disquieting trend on the grounds that it lacks compelling support in law and is based on essentially mythical premises about litigation.

*In re Halkin*,<sup>10</sup> a 1979 decision by a sharply divided panel of the United States Court of Appeals for the District of Columbia Circuit, is

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<sup>5</sup> FED. R. CIV. P. 26(c).

<sup>6</sup> See 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2036, at 267, 269 (1970) (emphasizing that court has complete control over discovery process and may be as inventive as necessities of particular case require).

<sup>7</sup> Rule 26(c)(7) specifically authorizes entry of a protective order with respect to "a trade secret or other confidential research, development, or commercial information." FED. R. CIV. P. 26(c)(7).

<sup>8</sup> See, e.g., *Halkin v. Helms*, 690 F.2d 977, 982 n.13 (D.C. Cir. 1982) (sealing of documents filed by plaintiff in opposition to defendants' motion for summary judgment); *Gallela v. Onassis*, 487 F.2d 987, 997 (2d Cir. 1973) (plaintiff excluded from deposition of defendant to prevent him from taking pictures of defendant during deposition).

<sup>9</sup> See *infra* text accompanying notes 37-42.

<sup>10</sup> 598 F.2d 176 (D.C. Cir. 1979).

the leading case in this trend. Given its prominence, the case merits detailed examination at the outset to exemplify the emerging principles. The *Halkin* plaintiffs sued a number of present and former CIA officials, alleging that they had been the victims of illegal surveillance because they opposed the Vietnam War. Pursuant to rule 34, they obtained production of some 3,000 pages of material that the defendants had already purged of "sensitive" information prior to production.<sup>11</sup> Before delivering the documents to the plaintiffs, the defendants neither moved for a protective order nor obtained the plaintiffs' agreement to hold the documents in confidence.<sup>12</sup> After inspecting the documents, the plaintiffs gave written notice to the defendants that they intended to release three documents to the press one week thereafter. This notice prompted the defendants to move for a protective order on the ground that disclosure would deprive them of a fair trial. The trial court entered a protective order, even though the defendants had submitted no affidavits in support of their motion.<sup>13</sup>

The trial court's ruling was questionable under accepted protective order doctrine. The defendants had purged the documents before production and there was little indication that the expurgated remnants contained material warranting a protective order. More significantly, the defendants' failure to submit affidavits would normally have required denial of their motion. Writing for the majority, Judge Bazelon<sup>14</sup> eschewed the easy course of relying on existing protective order principles to overturn the order.<sup>15</sup> Instead, he analogized protective orders to prior restraints and articulated a broad constitutional limitation on the issuance of protective orders.<sup>16</sup> He emphasized the public interest in the administration of justice and the theory that the discovery process, as part of the judicial process, is public.<sup>17</sup> Concluding that the discovery rules "place no limitations on what a party may do with

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<sup>11</sup> *Id.* at 180.

<sup>12</sup> *Id.* There is some indication, however, that the defendants did, at some point, request that the plaintiffs not release the documents. In their letter to the defendants announcing their intention to release the documents, the plaintiffs' counsel referred to "your letter [which] has given us an opportunity to consider how we will handle the public release of such documents." *Id.* at 181 n.4.

<sup>13</sup> *Id.* at 181-82.

<sup>14</sup> Although this article criticizes the breadth of Judge Bazelon's language in *Halkin*, it is not intended to question his very substantial contribution to first amendment law in general. For a discussion of that contribution, see Brotman, *Judge David Bazelon: Making the First Amendment Work*, 33 FED. COM. L.J. 39 (1981).

<sup>15</sup> To some extent, Judge Bazelon may have relied on first amendment issues to justify the extraordinary remedy of mandamus. *See* 598 F.2d at 213-15 (Wilkey, J., dissenting) (arguing that mandamus was inappropriate).

<sup>16</sup> By the time Judge Bazelon wrote, the question of the release of the initial three documents had become moot because the New York Times reported on the contents of these documents eight days after the trial court entered its protective order. 598 F.2d at 182.

<sup>17</sup> *See id.* at 188.

materials obtained in discovery,"<sup>18</sup> he reasoned that the flexible good cause standard of rule 26(c) inadequately protected the substantial first amendment interest in discovery materials. Thus, the majority held that when a protective order "restricts expression," the first amendment mandates a stricter standard and more elaborate findings.<sup>19</sup> In dissent, Judge Wilkey argued that the court should have retained the good cause standard, asserting that the court's power to deny production implicitly included the lesser power to restrict disclosure.<sup>20</sup>

Few existing protective orders, if any, could satisfy *Halkin's* strict requirements. As Judge Bazelon apparently intended, *Halkin* has made the first amendment an important ingredient in protective order litigation. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*<sup>21</sup> is perhaps the most striking example of this development. In *Zenith*, a massive anti-trust action, the court entered an "umbrella" protective order early in the case, permitting any party producing documents to designate them confidential. Pursuant to that order, the parties designated hundreds of thousands of documents confidential and some 385 pleadings and other papers were filed in court under seal. After the parties completed extensive discovery, Judge Becker granted the defendants' motions for summary judgment.<sup>22</sup> Notwithstanding the decision on the merits, Judge Becker still had to contend with the plaintiffs' motion to vacate the protective order on the ground that it violated the first amendment. Even though the plaintiffs themselves had vigorously used the "confidential" stamp,<sup>23</sup> Judge Becker agonized at length over their constitutional and common law arguments before concluding that only a portion of the materials implicated any first amendment interests.<sup>24</sup>

If *Zenith* represents the wave of the future, rule 1 interests may be undermined by litigation about whether the court should issue a protective order or vacate one already in effect. Although most commentators have inexplicably disregarded this consequence,<sup>25</sup> some judges clearly

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<sup>18</sup> *Id.*

<sup>19</sup> See *id.* at 191-96. For a discussion of the *Halkin* standards, see *infra* text accompanying notes 102-10.

<sup>20</sup> 598 F.2d at 205-09 (Wilkey, J., dissenting).

<sup>21</sup> 529 F. Supp. 866 (E.D. Pa. 1981).

<sup>22</sup> *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100 (E.D. Pa. 1981), *appeal docketed*, No. 81-2331 (3d Cir. Aug. 24, 1981).

<sup>23</sup> Plaintiff *Zenith* had produced some 100,000 documents on paper preprinted with the legend "confidential per court order." See 529 F. Supp. at 875 n.11.

<sup>24</sup> See *infra* text accompanying notes 202-06 for a discussion of Judge Becker's rationale in deciding which of the documents involved in the summary judgment decision to declassify.

<sup>25</sup> The emerging issues relating to constitutional limitations on the power of courts to enter protective orders have received substantial attention from the commentators, who, for the most part, have been enthusiastic about this development. The bulk of this commentary analyzes first amendment law in general and the prior restraint doctrine in particular. None of it does more than acknowledge the possibility that this development may disrupt civil discovery. See Dore, *Confidentiality Orders—The Proper Role of the Courts in Providing Confidential*

and understandably are upset at the prospect.<sup>26</sup> To the extent that *Halkin* will increase wasteful protective order litigation, the existing good cause standard is preferable. In an attempt to demonstrate that such a ruinous course is unnecessary, this article begins in Part I with a brief survey of the current role of protective orders in discovery. In Part II, the article explores *Halkin*'s potential impact on that reality. Part III then argues that the public access approach is a myth not only contrary to reality, but also lacking legal support. In place of the broad public access approach, it identifies the specific situations in which nonparty access to confidential discovery materials is justified. Finally, Part IV rebuts *Halkin*'s assumption that the Federal Rules contemplate unfettered disclosure of discovered material and argues that rule 1 interests and privacy concerns command significant weight even against the first amendment rights of the public and the litigants. Ultimately, the article urges courts to adopt a doctrine of waiver that forecloses any later claim of a right to disclose material initially obtained under a protective order. By discrediting the foundation of the public access approach to discovery and formulating a doctrine to dispose of disclosure claims, this article offers a means to save the reality from the myths.<sup>27</sup>

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*Treatment for Information Disclosed Through the Pre-Trial Discovery Process*, 14 NEW ENG. L. REV. 1 (1978); Note, *Rule 26(c) Protective Orders and the First Amendment*, 80 COLUM. L. REV. 1645 (1980); Note, *The First Amendment Right to Disseminate Discovery Materials*: In re *Halkin*, 92 HARV. L. REV. 1550 (1979); Note, *Constitutional Standards Governing Issuance of Protective Orders Pursuant to Fed. R. Civ. P. 26(c) When Freedom of Speech is Restrained*—In re *Halkin* 598 F.2d 176 (D.C. Cir. 1979), 52 TEMP. L.Q. 1197 (1979); Comment, In re *San Juan Star: Discovery and the First Amendment*, 34 BAYLOR L. REV. 229 (1982); Comment, *Protective Orders Prohibiting Dissemination of Discovery Information: The First Amendment and Good Cause*, 1980 DUKE L.J. 766; Recent Decision, *If the Issuance of a Protective Order Pursuant to Federal Rule 26(c) Would Restrain Expression, The District Court Must Determine the Order's Constitutionality Under the First Amendment*, 48 GEO. WASH. L. REV. 486 (1980); Comment, *Dissemination of Discovery Materials is Constitutionally Protected*, 55 NOTRE DAME LAW. 424 (1980); Comment, *Discovery and The First Amendment*, 21 WM. & MARY L. REV. 331 (1979).

<sup>26</sup> Some courts have not hidden their exasperation. For example, Justice Dolliver of the Washington Supreme Court has described *Halkin* and its progeny as "the morass of rather tendentious First Amendment commentary which has afflicted some of the federal courts in recent cases." *Rhinehart v. Seattle Times*, 98 Wash. 2d 226, 258, 654 P.2d 673, 691 (1982) (Dolliver, J., concurring), cert. granted, 52 U.S.L.W. 3261 (U.S. Oct. 14, 1983) (No. 82-1721).

<sup>27</sup> It is worthwhile at the outset to note what is *not* involved in a constitutional analysis of protective orders. First, such an order does not have the same effect as a "gag" order, which forbids any discussion of a case. Such orders violate the first amendment. See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976). Nonetheless, as acknowledged in Part IV, the entry of a protective order may chill discussion of a particular case because the litigant subject to the order will be reluctant to talk about the case, fearing that his opponent will allege that his statements are based on the confidential information.

Second, a protective order has no impact on a party's ability to disseminate information obtained through means other than discovery. First amendment interests in dissemination may exist even with respect to stolen information. See *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Bridge C.A.T. Assoc. v. Technicare Corp.*, 710 F.2d 940 (2d Cir. 1983); *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1008 n.16 (3d Cir. 1976). Rule 26(c) applies only to limitations on material obtained through judicial mechanisms. Therefore it

## I

THE REALITY OF DISCOVERY AND THE ROLE OF  
PROTECTIVE ORDERS

To appreciate the reality of protective order litigation, one must first appreciate the reality of discovery in general. The Federal Rules of Civil Procedure were designed to effect a revolution in litigation by broadening the availability of discovery.<sup>28</sup> They did so, with the result that the intrusiveness and burdensome nature of discovery is the most cited objection to the litigation boom. As a former federal judge observed in 1976, "[a] foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the fourth amendment."<sup>29</sup> This concern is not easily disregarded, particularly in view of the broad opportunity to compel disclosure by nonparties, and the urge to restrain discovery is hard to resist. In 1980, three Justices of the Supreme Court dissented from the promulgation of amendments to the Federal Rules' discovery provisions on the ground that the amendments did not sufficiently curb the overuse of discovery.<sup>30</sup> Since then, the Court has amended the discovery rules to require courts to take a more active role in controlling discovery.<sup>31</sup> Thus, the tide may be turning against intrusiveness.

The need to permit full preparation for trial is the normal justification for intrusion into the affairs of parties and nonparties. The

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provides no basis for restraining disclosure of information obtained by other means. *See International Prods. Corp. v. Koons*, 325 F.2d 403, 408-09 (2d Cir. 1963); *cf. Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254 (N.D. Ill. 1981) (holding that privileged materials stolen from defendant's garbage can by plaintiff may be used as evidence).

<sup>28</sup> See generally 8 C. WRIGHT & A. MILLER, *supra* note 2, §§ 2002-07 (1970); Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1059-60 (1955); *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 950-51 (1961).

<sup>29</sup> Rifkind, *Are We Asking Too Much of Our Courts?*, 70 F.R.D. 96, 107 (1976).

<sup>30</sup> See *Amendments to the Federal Rules of Civil Procedure*, 446 U.S. 997 (1980) (Powell, Stewart, and Rehnquist, J.J., dissenting); *cf. Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (discussing "possible abuse of the liberal discovery provisions of the Federal Rules" in securities cases).

<sup>31</sup> The new amendments, which became effective on August 1, 1983, are designed to curb abusive litigation and assure that the courts take a more active hand in managing discovery. *See Federal Rules of Civil Procedure*, 97 F.R.D. 165 (1983). Rule 11, as amended, applies to all papers, including formal discovery, and imposes on the attorney signing such papers the duty to make "reasonable inquiry . . . that it is not interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." *Id.* at 167. Rule 26(b)(1) now authorizes courts to limit discovery when the party seeking discovery has had adequate opportunity to complete discovery, when more convenient means of discovery are available, or when "the discovery is unduly burdensome or expensive, given the needs of the case." *Id.* at 172. Finally, and most significantly, rule 16, as amended, requires courts to enter an order within 120 days of the filing of the complaint limiting the time in which the parties must complete discovery. *Id.* at 168-69. Thus, the amended discovery rules have greatly expanded the role of the court in discovery. See generally Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure*, 66 JUDICATURE 363 (1983).

Supreme Court, in its leading discovery case, *Hickman v. Taylor*,<sup>32</sup> emphasized that full disclosure is at the heart of the discovery rules, which were intended to enable the parties "to obtain the fullest possible knowledge of the issues and facts before trial."<sup>33</sup> Accordingly, the Court directed that "the discovery provisions are to be applied as broadly and liberally as possible,"<sup>34</sup> an admonition many lower courts took to heart. Some lower courts, for example, have held that a lawyer's instruction to a deposition witness to refuse to answer a question on the ground that the question is irrelevant is improper behavior warranting sanctions.<sup>35</sup> Courts have extended this general presumption in favor of disclosure into the area of confidential information. As the Tenth Circuit has explained, "[t]he need for the information is held paramount but reasonable protective measures are supplied to minimize the effect on [the parties making the compelled disclosures]."<sup>36</sup> The reason for this attitude is that the use of discovered information should be limited to the purpose for which its disclosure was compelled—preparation for trial. Thus have protective orders removed some of the harsh edges of liberal discovery.

Emphasizing the rationale underlying discovery helps to explain a central psychological reality of discovery practice—the assumption that any use of discovery materials except to prepare for trial is inappropriate. Indeed, attorneys arguing against the issuance of a formal protective order often proclaim their adherence to this view to assure nervous adversaries that there is no need to worry that information they obtain through discovery will be put to nonlitigation uses. Proving that this

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<sup>32</sup> 329 U.S. 495 (1947).

<sup>33</sup> *Id.* at 501.

<sup>34</sup> *Id.* at 506.

<sup>35</sup> *See, e.g.,* *Ralston Purina Co. v. McFarland*, 550 F.2d 967, 973 (4th Cir. 1977); *International Union of Elec., Radio & Mach. Workers v. Westinghouse Elec. Corp.*, 32 Fed. R. Serv. 2d (Callaghan) 632, 634 (D.D.C. 1981); *United States v. IBM*, 79 F.R.D. 378, 381 (S.D.N.Y. 1978); *Lloyd v. Cessna Aircraft Co.*, 74 F.R.D. 518, 519-20 (E.D. Tenn. 1977); *Drew v. International Bhd. of Sulphite & Paper Mill Workers*, 37 F.R.D. 446, 449-50 (D.D.C. 1965). Rule 30(c) itself states that "[e]vidence objected to shall be taken subject to the objections." The justification is that requiring answers over objections that the question is irrelevant expedites the discovery process, although an exception is made, of course, where trade secrets or privileged information is involved. Thus, even the elastic relevancy limitations of rule 26 give way in the deposition situation to expedite the process.

<sup>36</sup> *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 999 (10th Cir. 1965), *cert. denied*, 380 U.S. 964 (1966). Sometimes the need for confidentiality outweighs the interest of the litigant in having the information. For example, in *Andrews v. Eli Lilly & Co.*, 97 F.R.D. 494 (N.D. Ill. 1983), the defendant drug manufacturer, sued for injuries allegedly caused by the drug DES, subpoenaed data compiled by a medical researcher who had spent years studying the effects of DES. The witness resisted on the ground that breaching the confidentiality under which he had been compiling information would destroy his research efforts. The court granted his motion for a protective order against the discovery, in part, on the theory that there is a first amendment interest that would be undercut by impairing the free flow of information to medical researchers. *See id.* at 500. One suspects that the court may have felt that the defendant hoped to undermine the research effort.



assumption exists is difficult, in part because it is so pervasive.<sup>37</sup> Even in *Halkin*, where there existed no protective order or prior agreement that the previously purged material be held in confidence, the plaintiffs felt constrained to give the defendants one week's notice of their intent to release discovered documents to the press.<sup>38</sup> The tendency of courts to enter protective orders, sometimes *sua sponte*,<sup>39</sup> limiting the use of *all* information produced through discovery to preparation for trial provides additional evidence of the existence of this assumption.<sup>40</sup> Even though there was no formal protective order, at least one court has enforced such a restriction on the ground that because the parties understood the practice it was tantamount to a stipulated Rule 26(c) order.<sup>41</sup>

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<sup>37</sup> Faced with the challenge of *Halkin*, some courts are putting this previously unstated assumption into words. Thus, the Washington Supreme Court recently described the underlying assumption as follows:

Parties seeking to utilize the processes of discovery necessarily acquaint themselves with the rules which attend that process. They know the purposes for which discovery is intended, and that protective orders can be entered in the discretion of the court. Attorneys are surely aware that it is improper to exploit the fruits of discovery by using them for other than authorized purposes. It is true that no penalty can attach for such use if a protective order is not obtained; but it is understood in the majority of cases that confidentiality will be respected, thus removing the necessity of seeking such an order to protect against unwanted publicity.

Rhinehart v. Seattle Times, 98 Wash. 2d 226, 239 n.4, 654 P.2d 673, 681 n.4 (1982), *cert. granted*, 52 U.S.L.W. 3261 (U.S. Oct. 4, 1983) (No. 82-1721).

<sup>38</sup> As indicated *supra* note 12, there was an indication that the defendants had requested such notice. Absent an agreement to provide such notice, however, the plaintiffs would not have been under an obligation to do so.

<sup>39</sup> In *Quinter v. Volkswagen of Am.*, 676 F.2d 969, 971 (3d Cir. 1982), for example, the trial court rejected the defendant's proposed protective order and directed instead that all material obtained by the plaintiff through discovery be used only in preparation for the litigation.

<sup>40</sup> See, e.g., *Quinter v. Volkswagen of Am.*, 676 F.2d 969, 971 (3d Cir. 1982); *Krause v. Rhodes*, 671 F.2d 212, 215 (6th Cir.), *cert. denied*, 103 S. Ct. 54 (1982); *National Polymer Prods. Co. v. Borg-Warner Corp.*, 641 F.2d 418, 420 (6th Cir. 1981); *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 293 (2d Cir. 1979); *AT&T v. Grady*, 594 F.2d 594, 595 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979); *Sperry Rand Corp. v. Rothlein*, 288 F.2d 245, 246 (2d Cir. 1961); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 424 (E.D.N.Y. 1983) (documents disclosed by United States Department of Agriculture); *In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 578, 578 (Pretrial Order No. 44 governing all videotaped depositions), 587, 588 (Pretrial Order No. 42 governing all documents produced by the Environmental Protection Agency) (E.D.N.Y. 1983); *United States v. ARA Servs., Inc.*, 1978-2 Trade Cas. (CCH) ¶ 62,250 (E.D. Mich. 1978); *Alloy Cast Steel Co. v. United Steelworkers*, 70 F.R.D. 687, 689 (N.D. Ohio 1976); *Textured Yarn Co. v. Burkhart-Schier Chem. Co.*, 41 F.R.D. 158 (E.D. Tenn. 1966); W. SCHWARZER, *MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION* 311-15 (1982) (reproducing protective order entered in *In re Uranium Indus. Antitrust Litig.* No. MDL 342 (N.D. Ill. Sept. 6, 1978)); *Hazard & Rice, Judicial Management of the Pretrial Process in Massive Litigation: Special Masters as Case Managers*, 1982 AM. B. FOUND. RESEARCH J. 375, 398 (describing order in *United States v. AT&T* that applied to all documents produced).

<sup>41</sup> *GAF Corp. v. Eastman Kodak Co.*, 415 F. Supp. 129, 131-32 (S.D.N.Y. 1976) (limitation applied to all documents, not only those designated as confidential); cf. *Grumman Aerospace Corp. v. Titanium Metals Corp.*, 91 F.R.D. 84 (E.D.N.Y. 1981) (private prelitigation

Parties desire to keep information confidential for many legitimate reasons. Although some of these reasons might not constitute good cause under rule 26(c), they are often important to the parties. For example, in an antitrust price-fixing case, one would ordinarily expect that the defendants' principal concern would be to restrict the plaintiff's dissemination of information. Although that undoubtedly is a concern, the defendants may be more concerned about turning over such information to any codefendant competitors, not only because the information is a trade secret, but also because the exchange of such information is often the predicate for a price-fixing claim. Even if this concern initially appears specious, the astute antitrust defendant desires to preclude any possibility that the exchange of pricing information during discovery will return to haunt him in a later antitrust proceeding. One can imagine other similar concerns about disclosure. Thus, a protective order may protect a number of interests by precluding disclosure of otherwise confidential information that may have untoward consequences wholly unnecessary to the full preparation of the case for trial.

Against this background, it should come as no surprise that in complex cases the parties customarily stipulate to protective orders negotiated by opposing counsel. In recognition of the general confidentiality of discovery, these negotiations normally focus on which protective devices the parties will use—e.g., limitations on access, separate storage, and the designation of persons eligible for access—rather than on the question of whether there should be an order limiting dissemination of discovery materials. These stipulated orders, which usually provide “umbrella” protection for all materials designated confidential by the party producing them, have become the norm in many areas of federal practice. Judge Becker acknowledged this reality in *Zenith*, observing that he was “unaware of any case in the past half-dozen years of even a modicum of complexity where an umbrella protective order . . . has not been agreed to by the parties and approved by the court. Protective orders have been used so frequently that a degree of standardization is appearing.”<sup>42</sup> The parties agree to such orders in order to commence discovery without the expense and delay involved in debating the scope of protective provisions.

The standardized protective order forms confirm this practical ori-

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agreement with respect to exchange of confidential materials held unenforceable against discovery request).

<sup>42</sup> 529 F. Supp. at 889. Even in *Halkin*, the court recognized that “[t]his procedure is commonly used to preserve parties’ right to assert claims of privilege with respect to particular documents in complex cases.” 598 F.2d at 196 n.47. *But cf.* *United States v. Hooker Chem. & Plastics Corp.*, 90 F.R.D. 421, 425 (W.D.N.Y. 1981):

[T]he fact that something may be the general practice does not mean that the practice must be adopted by an unwilling party. The State is certainly within its rights to demand that Hooker make the requisite showing if it believes the confidentiality claim would be used haphazardly like a “rubber stamp.”

entation. *The Handbook of Recommended Procedures for the Trial of Protracted Cases*, introduced in 1960, proposed that courts should routinely enter protective orders covering all confidential information produced through discovery.<sup>43</sup> The *Handbook's* successor, the *Manual for Complex Litigation*, sets forth an instructive sample protective order.<sup>44</sup> This order permits the party producing material to designate as confidential a broad range of commercial information.<sup>45</sup> The discovering party may disclose such information only to counsel of record and other "qualified persons" involved in preparation for trial, whom the discovering party has previously identified to the producing party.<sup>46</sup> The sample order further directs counsel to designate as confidential all summaries or exhibits that they have prepared using designated information.<sup>47</sup> The discovering party must return all designated information, including any

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<sup>43</sup> HANDBOOK OF RECOMMENDED PROCEDURES FOR THE TRIAL OF PROTRACTED CASES, Sample Form No. 4 pt. II, para. 6, reprinted in 25 F.R.D 351, 447 (1960) (adopted by Judicial Conference in March, 1960) (such information "shall be used for no purpose other than for preparation for trial in this case.").

<sup>44</sup> MANUAL FOR COMPLEX LITIGATION, pt. II, § 2.50, at 357 (5th ed. 1982). For other examples of protective orders, see W. SCHWARZER, *supra* note 40, at 235-37, 311-15, 405-10 (reproducing protective orders entered in several recent cases).

<sup>45</sup> See MANUAL FOR COMPLEX LITIGATION, pt. II, § 2.50, at 357-58, para. 1 (5th ed. 1982). This paragraph identifies financial, engineering, and marketing information and information relating to business plans as information eligible for designation. The paragraph further provides, however, that "[it] shall not be deemed to exclude any other type or classification of documents for which confidentiality is claimed by a party." Whether this provision is limited to matters included within rule 26(c)(7) is unclear. Consequently, the parties may devise their own version of confidentiality. Such liberties with the definition of confidentiality become significant when a challenge to the designation of certain materials comes before the court. The parties may then argue that the court should apply the order's definition of confidentiality rather than the definition in rule 26(c)(7). Although the fact that the order must be based on rule 26(c) may appear to undercut this argument, it must be remembered that the court does have broad discretion. Absent such a motion, however, protective provisions can apply to materials that would not otherwise qualify for protection under rule 26(c)(7). Oddly enough, the *Manual's* sample order does not contain an express provision relating to a possible challenge to a party's designation. Under the sample order, then, a court may have no occasion to limit the protective provisions to materials that would invoke rule 26(c) protections.

<sup>46</sup> See MANUAL FOR COMPLEX LITIGATION, pt. II, § 2.50, at 358, para. 2 (5th ed. 1982). The sample order designates as qualified persons only counsel of record. Any other person, including the client, must execute an affidavit stating that he will obey the order. See Note, *Balancing Competing Discovery Interests in the Context of the Attorney-Client Privilege: A Trilemma*, 56 S. CAL. L. REV. 115 (1983) (arguing that prohibiting disclosure to clients strains attorney-client relationship).

The sample order further requires that the party producing the confidential material be given advance notice so that he may object to the inclusion of this new person. Such a provision, however, arguably invades the attorney's work product to the extent that it requires the identification of expert consultants retained by the attorney, whose identity would not otherwise have to be revealed. See FED. R. CIV. P. 26(b)(4)(B). Under the sample order, the attorney, prior to allowing such expert consultants to inspect designated materials, must first notify the producing party that the consultant has become a "qualified person." This matter is, of course, a proper subject for negotiation in the drafting of a stipulated protective order.

<sup>47</sup> See MANUAL FOR COMPLEX LITIGATION, pt. II, § 2.50, at 359, para. 6 (5th ed. 1982).

documents prepared by counsel, to the producing party at the termination of the litigation.<sup>48</sup> In the interim, the order strictly limits the use of the information; it provides that persons receiving confidential documents or information through their participation in the litigation "shall not disclose such confidential documents, their contents, or any portion or summary thereof to any person or persons not involved in the conduct of this litigation."<sup>49</sup>

Thus, protective order practice has effected substantial limitations on the dissemination of discovery material without substantial court involvement. The parties are often overzealous in designating materials confidential. In *Zenith*, for example, plaintiff Zenith produced some 100,000 pages of material on paper preprinted with a confidentiality designation.<sup>50</sup> In some cases, the parties designate every document produced confidential.<sup>51</sup> The availability and frequent use of substantial confidentiality protections should minimize concerns about the possible misuse of information and, at the same time, maximize access to it.

The assumption of confidentiality carries over into the conduct of the discovery process. Far from being open to the public, discovery actually occurs in private. For example, much of the information collected in preparation for litigation is gathered through investigation conducted by or for counsel rather than through formal discovery. In accordance with the belief of many judges and attorneys that investigation is the most important part of pretrial preparation, the public interest in prediscovery investigation should be equal to the public interest in formal discovery. Although some have argued that such investigation is sufficiently formal to warrant court supervision,<sup>52</sup> in practice this investigation remains a private affair. The work product doctrine generally

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<sup>48</sup> See *id.* at 359-60, para. 7. Because counsel's own summaries are confidential materials within the meaning of the order, a judge should normally exempt work product materials from the duty to return. Courts treat the obligation to return discovered documents quite seriously. For example, in *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770 (9th Cir. 1983), the trial court held the plaintiff in contempt for failure to return documents at the end of the litigation, as required by the protective order. A divided panel of the court of appeals reversed the finding of contempt on the ground that there was insufficient evidence that Falstaff had wilfully violated the protective order. It did, however, affirm the district court's order awarding defendants more than \$27,000 in attorney's fees in connection with proceedings regarding the failure to return the documents.

<sup>49</sup> MANUAL FOR COMPLEX LITIGATION, pt. II, § 2.50, at 358, para. 3 (5th ed. 1982).

<sup>50</sup> 529 F. Supp. at 875 n.11. Judge Becker noted further that "the parties had long since gone far beyond erring on the side of caution and had stamped 'confidential' on their submissions and discovery materials almost as a matter of course." *Id.* at 878.

<sup>51</sup> According to the brief for the United States in opposition to the petition for certiorari in *AT&T v. MCI Communications Corp.*, AT&T not only treated all documents produced as confidential but also designated every page of every deposition as confidential, often before the deposition had commenced. See Brief for the United States In Opposition to Petition for Certiorari at 4, *AT&T v. MCI Communications Corp.*, 695 F.2d 594 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979).

<sup>52</sup> See *United States v. IBM*, 415 F. Supp. 668 (S.D.N.Y. 1976) (rejecting defendant's

shields such investigation from discovery;<sup>53</sup> not even the adverse party, much less the general public, has a right to information obtained through prediscovery investigation.<sup>54</sup>

Formal discovery under the Federal Rules is often no more public than the investigation process. Indeed, the principal distinction between investigation and formal discovery is that investigation is carried on without notice to the other parties to the lawsuit. The private character of formal discovery is the result of two factors. First, reliable public notice about the actual time and place of pretrial discovery is rare. Although the rules authorize the parties to initiate formal discovery by filing notices in court,<sup>55</sup> much discovery, particularly by deposition, is often scheduled informally without any filing. Even when the parties have filed a notice, discovery is often rescheduled to accommodate the calendars of the lawyers, the parties, or the witnesses.

Second, and more significantly, pretrial discovery usually takes place in law offices or on other private property.<sup>56</sup> Document inspection and depositions lie at the heart of the pretrial preparation process. Both of these activities ordinarily occur either in the lawyer's offices, on the producing party's business premises, or at some other private place. Although the deposing party must obtain a court order to exclude the other party from a deposition,<sup>57</sup> no court order is required to exclude nonparties who simply evince an interest in observing the deposition. Thus, even if a newspaper reporter or some other nonparty were to present himself at the right time and place, the parties could legally refuse to

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argument that interviews conducted on plaintiff's behalf using FBI agents are "virtually depositions").

<sup>53</sup> The protection is implicit in the work product doctrine for, as Justice Jackson put it, "[d]iscovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary." *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring).

<sup>54</sup> There are circumstances, however, where discovery is allowed for the fruits of investigation. *See* FED. R. CIV. P. 26(b)(3) (allowing discovery of some witness statements and, on a showing of substantial need, other work product); FED. R. CIV. P. 26(b)(4)(B) (allowing discovery of facts known or opinions held by an expert employed in anticipation of litigation but not expected to testify (i.e., for investigative purposes) only under "exceptional circumstances").

<sup>55</sup> *See* FED. R. CIV. P. 30-34.

<sup>56</sup> This observation, of course, applies only to depositions and document inspection and is not true with respect to written discovery mechanisms such as interrogatories and requests for admissions. But interrogatories and requests for admissions tend by their very nature to be so general or so specific that they do not set forth or explain the really significant details unearthed by the other forms of discovery.

<sup>57</sup> *See* *Galella v. Onassis*, 487 F.2d 986, 997 (2d Cir. 1973); *Metal Foil Prods. Mfg. Co. v. Reynolds Metals Co.*, 55 F.R.D. 491 (E.D. Va. 1970). Several courts have held that rule 615 of the Federal Rules of Evidence is applicable to an attempt to exclude a party's retained expert from a deposition. *See, e.g., Williams v. Elec. Control Systems, Inc.*, 68 F.R.D. 703 (E.D. Tenn. 1975).

admit him. Public access to document inspections, which often occur on the producing party's business premises, is similarly limited.

According to the Federal Rules, then, the public has neither the opportunity nor the right to observe discovery. For some discovery activities, however, the Federal Rules appear to require a public record of the fruits of the activity. That appearance, however, is largely misleading. Document inspection, despite its central importance to pretrial preparation, produces no public record.<sup>58</sup> Instead, the inspecting party normally obtains copies of the documents it deems relevant for future use in the case. These documents are not filed in court, and no record is made of the documents not copied. Although the Federal Rules have traditionally required that the parties file interrogatory answers, responses to requests for admissions, and deposition transcripts, under the 1980 amendments courts may order that these materials not be filed.<sup>59</sup> Even before the amendments, a Federal Judicial Center study showed that the parties neglected to record twenty-five percent of all discovery activity.<sup>60</sup> As a result of the 1980 amendments, which were designed as a space saving measure, there may be no public record of such discovery materials even though no party has alleged that they contain confidential information. Indeed, many district courts have adopted local rules that eliminate filing of some or all of these discovery materials.<sup>61</sup> In

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<sup>58</sup> A deposition may be taken in connection with the production of documents by a third party. *See* FED. R. CIV. P. 45(b). Even then, however, a substantial public record very rarely is generated.

<sup>59</sup> In 1980, rule 5(d) was amended to provide that a "court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court." The Section of Litigation of the American Bar Association had urged a change in the mandatory filing provisions which would have amended rule 5(d) to forbid filing except by court order. *See* ABA SECTION OF LITIGATION, REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE (1977), *reprinted in* 92 F.R.D. 149, 156-57 (1977). Several states have such a rule. *See, e.g.,* CAL. CIV. PROC. CODE § 2030 (West Supp. 1983). The shift to a rule of nonfiling excited some opposition, however. *See* REPORT OF THE AD HOC COMMITTEE TO STUDY THE HIGH COST OF LITIGATION TO THE SEVENTH CIRCUIT JUDICIAL COMMITTEE AND THE BAR ASSOCIATION OF THE SEVENTH FEDERAL CIRCUIT (1979), *reprinted in* 86 F.R.D. 267, 284-85 (1979) (arguing that having discovery on file assists court in keeping tabs on parties' progress in discovery). The amendment was, thus, a compromise, requiring action to terminate the filing requirement rather than action to reinstate it. The Advisory Committee on the Federal Rules noted that "such materials are sometimes of interest to those who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the public generally." FED. R. CIV. P. 5(d) advisory committee note. One commentator has labeled the amendment "misguided" precisely because it will impair public access to discovery materials. *See* Note, *Nonparty Access to Discovery Materials in the Federal Courts*, 94 HARV. L. REV. 1085, 1095 n.51 (1981).

<sup>60</sup> P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 27 (1978); *cf.* *Brown v. Felsen*, 442 U.S. 127, 128 (1979) ("Because the case was settled, respondent's sworn deposition was never made part of the court record.").

<sup>61</sup> Many district courts have adopted local rules providing that the parties are not to file

addition, where deposition transcripts are filed, many district courts have local rules that either prohibit public access to the materials or keep them under seal until the court orders them unsealed or until one of the parties formally requests that the court make them available to the public.<sup>62</sup> Even where the local rules provide that deposition transcripts shall be kept in an open file, access to the records is still effec-

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some or all discovery materials in court unless so ordered by the court or if the materials are needed in connection with motion proceedings. *See, e.g.*, C.D. CAL. R. 6(d) (all discovery); S.D. CAL. R. 230-4 (interrogatories, requests for admissions), 231-7 (depositions); M.D. FLA. R. 3.03(c) (interrogatories), 3.03(d) (depositions); N.D. GA. R. 181.2 (all discovery), 211.1 (depositions); C.D. ILL. R. 17 (all discovery); S.D. ILL. R. 16 (all discovery); N.D. & S.D. IOWA R. 2.3.33 (interrogatories); D. MINN. R. 8B(d) (all discovery); D. MONT. R. 8(c) (all discovery); D.N.H.R. 39 (all discovery); S.D.N.Y. Civ. R. 19 (all discovery); E.D.N.C.R. 3.09 (all discovery); D. OR. R. 120-4(a) (all discovery); D.P.R.R. 10 (all discovery); D.R.I.R. 13(a) (interrogatories, requests for documents, requests for admissions), 14(b) (depositions); D.S.C. Order of June 12, 1978, re Filing of Discovery (all discovery); M.D. TENN. R. 9(c)(1) (only depositions to be used in evidence, all interrogatories, requests for admissions, requests for documents); W.D. TEX. R. 300-6 (interrogatories, requests for documents, requests for admissions); W.D. WASH. CIV. R. 33(e) (interrogatories, requests for documents). For analogous state provisions, see CAL. CIV. PROC. CODE §§ 2019(f)(1), 2030(b) (West Supp. 1983).

It appears that the courts promulgated these rules to save space; several of the rules explicitly state that as their purpose. Only one, however, has made any provision for assuring the public some access to unfiled discovery materials: "During the pendency of any civil proceeding, any person may, with leave of court obtained after notice served on all parties to the action, obtain a copy of any deposition or discovery documents not on file with the court upon payment of the expense of the copy." D. OR. R. 120-4(b). The rule gives no indication of the showing, if any, that a person must make to justify the granting of such leave of court. Nonetheless, it is noteworthy that access is only by leave of court because such permission presumably would be unnecessary if the nonparty had an absolute right to obtain a copy of the materials.

<sup>62</sup> Many courts have special rules limiting public access to deposition transcripts that are on file. These rules generally provide that the transcripts will remain sealed even though they are on file. *See, e.g.*, D. ALASKA R. 8(A) (public inspection allowed only on order of court); S.D. CAL. R. 231-6 (clerk shall reseat the deposition after filing); D. CONN. R. 8(b) (depositions withheld from public inspection); C.D. ILL. R. 16 (deposition opened only at request of party or order of court); N.D. IND. R. 20 (unless otherwise ordered by the court, deposition opened only at request of party, judge, or member of judge's staff); D. KAN. R. 17(c) (deposition opened at request of attorney of record); D. MASS. R. 14(b) (deposition opened at request of attorney of record); D.N.D.R. 13 (deposition opened only on order of court); S.D. OHIO R. 4.6.2 (deposition opened only at direction of court or request of attorney of record); E.D. OKLA. R. 14 (deposition opened by order of court or written application by attorney of record); N.D. OKLA. R. 15 (deposition opened by order of court or on written application by attorney of record); W.D. OKLA. R. 15 (deposition opened by order of court or on written application by attorney of record); S.D. TEX. R. 10E (deposition opened on application by counsel of record or order of court); S.D. W. VA. R. 2.08 (deposition opened on order of court or written request of party); W.D. WIS. R. 19 (deposition opened only on request of party); D. WYO. R. 7(c) (deposition opened on application by attorney of record, then immediately resealed).

Arguably these limitations are inconsistent with rule 30(f). According to Professors Wright and Miller, "[u]pon filing the deposition should be immediately opened by the clerk, and made available for public inspection, unless the court has made a protective order that the deposition remain sealed." 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2119, at 438 (1970) (footnotes omitted). For a case overturning a local rule limiting access to filed deposition transcripts under an analogous state procedure, see *Tallahassee Democrat, Inc. v. Willis*, 370 So. 2d 867 (Fla. Dist. Ct. App. 1979).

tively limited because the filing occurs only after the deposition is completed.<sup>63</sup> Furthermore, the public access is restricted to reading the transcript in the clerk's office; such access does not include the right to copy the transcript.<sup>64</sup>

Even in the absence of a protective order, then, the filing provisions provide little reliable access to any discovery materials prior to trial. The actual privacy afforded pretrial proceedings is further buttressed by the entry of customary umbrella protective orders authorizing the filing under seal of confidential materials.<sup>65</sup>

In sum, discovery is not a public process. The public has no reliable method for determining when or where discovery proceedings will take place and no absolute right to attend them even if aware of the time and place. The fruits of discovery are often not filed in court, and, even when they are, the public may not have access to them. All of this is consistent with the underlying assumption of the litigants and the courts that discovery compels the disclosure of information solely to assist preparation for trial. This assumption, in turn, regularly leads parties to agree, and courts to order, that such information be put to no other use. The reality against which constitutional and common law issues should be assessed is, therefore, a reality of confidentiality—one that is inherent in the discovery process and essential if parties are to avoid the unwarranted harm that may result from the intrusiveness of modern discovery.

## II

### THE POTENTIAL IMPACT ON REALITY OF THE RIGHT OF ACCESS APPROACH

The cases endorsing a public right of access to discovery materials or emphasizing the parties' first amendment right to disseminate those materials offer a picture of the discovery process dramatically different from the reality described above. Rather than emphasizing the speedy resolution of private disputes, these courts suggest that litigation is imbued with a public interest that warrants access to all phases of the litigation process. Before addressing the potential impact of these decisions

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<sup>63</sup> Indeed, in some places even then the reporter may not file the deposition transcript. See *C.P.C. Partnership Bardot Plastics, Inc. v. P.T.R., Inc.*, 96 F.R.D. 184, 185 (E.D. Pa. 1982) (noting that practice in Eastern District of Pennsylvania is for reporter to give deposition transcript to deposing attorney, leaving it to attorney to file transcript himself).

<sup>64</sup> See *FED. R. CIV. P. 30(f)(2)* (requiring that reporter furnish copy of transcript to *deponent* or any *party* upon payment of reasonable charge). At best, the *public* has an opportunity to read the original in the clerk's office.

<sup>65</sup> See *MANUAL FOR COMPLEX LITIGATION*, pt. II, § 2.50, at 359, para. 5 (5th ed. 1982). But cf. *Associated Press v. United States Dist. Court*, 705 F.2d 1143, 1147 (9th Cir. 1983) (holding that district court order sealing all files "impermissibly reverse[d] the 'presumption of openness' that characterizes criminal proceedings").



on existing reality, it is useful to note the assumptions on which these courts have based their opinions.

Courts that reject requests for protective orders frequently assert that "pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings."<sup>66</sup> In addition, these courts emphasize the role that litigation plays in the resolution of major social issues while down-playing its function in resolving private disputes. In *Halkin*, for example, the majority stated that "[l]itigation itself is a form of expression protected by the First Amendment."<sup>67</sup> Other courts have emphasized the utility of litigation as a device for unearthing wrongs. The Seventh Circuit noted that

many important social issues became entangled to some degree in civil litigation. Indeed, certain civil suits may be instigated for the very purpose of gaining information for the public . . . . Civil litigation in general often exposes the need for governmental action or correction. Such revelations should not be kept from the public.<sup>68</sup>

Similarly, the Ninth Circuit has implied that discovery serves in part to "force a full disclosure" to the public<sup>69</sup> and the District of Columbia Circuit in *Halkin* viewed with equanimity the possibility of using civil litigation as an alternative to the Freedom of Information Act to obtain information in the government's possession.<sup>70</sup> At least one commentator has ventured to posit situations in which "even though the litigants may be perfectly willing to keep the facts of the litigation to themselves, the public interest requires that they not be permitted to do so."<sup>71</sup> The

<sup>66</sup> *AT&T v. Grady*, 594 F.2d 594, 596 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979); *see also* *Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27, 28 (E.D. Mich. 1981); *Parsons v. General Motors Corp.*, 85 F.R.D. 724, 726 (N.D. Ga. 1980); *Citicorp v. Interbank Card Ass'n*, 478 F. Supp. 756, 765 (S.D.N.Y. 1979) ("[S]ecrecy is the exception, not the rule."); *Davis v. Romney*, 55 F.R.D. 337, 340 (. . . E.D. Pa. 1972) ("[P]re-trial proceedings of the federal judicial system are conducted in public . . . ."); *Essex Wire Corp. v. Eastern Elec. Sales Co.*, 48 F.R.D. 308, 310 (E.D. Pa. 1969) ("[A]s a general proposition, trial and pre-trial proceedings of the federal judicial system are ordinarily conducted in public.").

<sup>67</sup> 598 F.2d at 187 (citing *In re Primus*, 436 U.S. 412, 431 (1978) and *NAACP v. Button*, 371 U.S. 415, 429-31 (1963)). *Primus* and *Button* both addressed the propriety of invoking the rules of professional conduct to restrict lawyers' use of litigation as a device to achieve social or political ends. For a discussion of the special problems that arise from the use of protective orders in public interest litigation, *see infra* text accompanying notes 282-87. For the present, it is sufficient to note that in each such case the goal sought by public interest litigation was judicial relief, rather than court-assisted access to otherwise unavailable information.

<sup>68</sup> *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 258 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). Although the quoted comments were generally directed toward rules restricting attorney comment in all cases, other courts have relied on them in protective order cases. *See, e.g., In re Halkin*, 598 F.2d at 187.

<sup>69</sup> *See Olympic Ref. Co. v. Carter*, 332 F.2d 260, 264 (9th Cir.), *cert. denied*, 379 U.S. 900 (1964).

<sup>70</sup> Thus, Judge Wilkey observed in dissent that the plaintiffs could have used the Freedom of Information Act, 5 U.S.C. § 552 (1982), to obtain the materials in question. *See* 598 F.2d at 207 n.30 (Wilkey, J., dissenting).

<sup>71</sup> Dore, *supra* note 25, at 15.

prospect exists, then, that a court may find that the public interest compels dissemination of discovered materials even over the objections of all the parties, an odd inversion of the litigants' first amendment rights of free expression.

In evaluating the first amendment rights of the parties to disseminate information obtained through discovery, those courts that endorse broad access to discovery materials begin with the presumption that the public has a right to such access. The public's alleged right to access, therefore, serves as an important backdrop against which these courts evaluate the litigants' first amendment rights to disclose discovered materials. These courts counter the contention that discovery exists solely for trial preparation by asserting that the Federal Rules presume unfettered use of discovery materials not covered by protective orders, thereby undercutting further the propriety of disclosure restrictions.

To protect both the alleged public interest in access and the first amendment rights of the litigants, these courts insist that the party seeking limitations on dissemination make a detailed showing of need and that judges rigorously scrutinize that showing. Consequently, these courts view protective orders as the exception, rather than the rule, even in complex cases in which protective order litigation is most burdensome to both the courts and the parties.

This approach not only disregards the realities of discovery and the current use of protective orders, but also threatens to exert a "pernicious effect on the smooth functioning of the discovery system."<sup>72</sup> Recognition of a first amendment right of access to discovered information would undermine litigants' confidence in protective orders. If one takes these decisions at face value, the party that produces information under shield of a protective order must realize that the continued confidentiality of the information depends more on the opposing litigant's whim in exercising his first amendment "right" to disclose the information than on the court's power to limit dissemination. This atmosphere of uncertainty is combined with the formidable burden of establishing a record sufficient to justify entry of a protective order. Together, mistrust of protective orders and the extensive record that the party requesting the order must compile threaten to eliminate stipulated protective orders, increase the risk that the parties will not disclose relevant information, impose substantial but unnecessary burdens on the litigants and the courts, and, in at least some cases, imperil the ability of the parties to reach settlements contingent on continued confidentiality. Courts that

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<sup>72</sup> *Koster v. Chase Manhattan Bank*, 93 F.R.D. 471, 477 (S.D.N.Y. 1982); see also *In re San Juan Star Co.*, 662 F.2d 108, 115-16 (1st Cir. 1981); Note, *The Work Product Doctrine in Subsequent Litigation*, 83 COLUM. L. REV. 412, 436 & n.167 (1983) (describing uncertainty of protective orders and noting impact of *Halkin*).

endorse the right of access, however, neglect to address these potential consequences.

### A. Stipulated Orders

The proliferation of stipulated protective orders enabled litigants to proceed with litigation and relieved courts of the burden of resolving discovery disputes. In view of the current trend, one must ask whether courts can continue to enter, and litigants continue to rely on, protective orders. The answers are unclear but ominous. Protective orders obviously are of little value if parties cannot rely on them. Yet the suggestion that the public interest in access to discovery materials may outweigh the parties' desire that these materials remain confidential certainly calls into question the parties' ability to stipulate to protective orders barring public access. Stipulated orders are, therefore, inherently inconsistent with right of access cases. To the degree that one accepts the broader assertions of those cases, stipulated orders may be ineffective against nonparties.

Of more practical importance is the view that the first amendment interests of the litigants preclude entry of protective orders absent a detailed showing that a compelling need for confidentiality exists. Arguably, a court must actually scrutinize the allegedly confidential materials before it issues an order, but courts do not follow this procedure in stipulated order situations. Although Judge Bazelon acknowledged in *Halkin* that umbrella orders might be appropriate in some cases,<sup>73</sup> the hurdles placed in the way of such orders may effectively make them unavailable.

One could attempt to avoid the constitutional and common law conflicts posed by this problem by asserting that conventional stipulated protective orders are not actually restraints on expression. Such orders do not purport to represent a judicial determination that certain materials are so confidential as to warrant restrictions on expression.<sup>74</sup> Usually, they permit any party to challenge the confidentiality designation and obtain a ruling on the issue.<sup>75</sup> At that point the burden of showing that the designated materials are confidential falls on the producing party.<sup>76</sup> Until a court invalidates a party's designation of materials as confidential, however, the order genuinely restricts disclosure and repre-

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<sup>73</sup> See 598 F.2d at 196 n.47 (noting that such "flexibility" may be appropriate in cases "where the discovery embraces a large quantity of documents").

<sup>74</sup> See *supra* note 45. The party makes the designation, not the court, and may do so according to standards that appear broader than rule 26(c)(7).

<sup>75</sup> As indicated, *supra* note 45, this is not always so; the sample order in the *Manual for Complex Litigation* contains no such provision. MANUAL FOR COMPLEX LITIGATION, pt. II, § 2.50, at 357 (5th ed. 1982). *Halkin* implies, however, that it is constitutionally required. See 598 F.2d at 196 n.47.

<sup>76</sup> *Halkin* implies that the Constitution requires the producing party to bear the burden of proving confidentiality. See also *Tavoulareas v. Piro*, 93 F.R.D. 24, 29 n.3 (D.D.C. 1981).

sents an actual restraint.<sup>77</sup>

The prospect of a subsequent judicial determination of the propriety of confidentiality designations may not, as a practical matter, be the equivalent of an initial finding that the parties should hold the materials in confidence. Although the burden remains on the producing party to make the requisite showing to justify confidentiality if a designation is challenged, courts often relax the standard in the absence of manifest abuse in the designation process. By the time the objection to the designation occurs, it is too late for the court to deny access to the materials altogether. Moreover, it often may be impractical for the court to try to review all designated materials simply because a party has challenged their designation. In *Zenith*, for example, Judge Becker simply refused to entertain the plaintiffs' motion for wholesale declassification, requiring them, instead, to designate specific materials.<sup>78</sup> Given the prospect of having to review hundreds of thousands of documents,<sup>79</sup> his action is not surprising. As a practical matter, then, the burden to justify confidentiality falls on the producing party only when the party challenging the confidentiality designation identifies specific documents,

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<sup>77</sup> For a case in which the court affirmed a contempt citation under analogous circumstances, see *Quinter v. Volkswagen of Am.*, 676 F.2d 969 (3d Cir. 1982) (suit to recover for injuries received in auto crash). The defendant resisted discovery and sought a protective order. The court ordered production and, rejecting the defendant's proposed protective order, directed the parties to use all materials produced solely for purposes of the litigation. One of the documents produced was an index prepared by the defendant of various crash tests it had performed on its cars. The plaintiff's expert, without seeking to have the order modified, displayed the index while being interviewed on the ABC television program "20/20," and also gave a copy of the index to an attorney who had retained him to assist in another suit against the defendant. The trial court held that each action constituted contempt and fined the expert \$10,000.

The appellate court held that the television episode "came within a scintilla" of contempt but did not actually constitute contempt because the document was not legible to viewers. *Id.* at 974. It therefore reversed the contempt finding on that count but affirmed the contempt finding on the alternative ground of disclosure to the second lawyer and remanded for a recalculation of the fine. On remand, the trial court assessed a fine of \$8,000. Letter from Louis Long (attorney for Volkswagen) to Richard Marcus (Nov. 16, 1982) (copy on file at *Cornell Law Review*). Although the sensitivity of the document probably was a factor in determining the amount of the fine, the case shows that unmodified orders that apply to a broad range of documents are genuine restraints on expression.

<sup>78</sup> 529 F. Supp. at 894 ("A party seeking wholesale declassification must first attempt to justify the investment of judicial and private resources demanded by such an exercise. Thus, to this extent, wholesale declassification shifts part of the burden to the party seeking disclosure.") (citations omitted).

<sup>79</sup> It is not clear from Judge Becker's opinion exactly how many documents the parties designated confidential, but the figures provided suggest the magnitude of the problem. The defendants produced some 35,000,000 documents. *Id.* at 874 n.6. Plaintiff *Zenith* designated more than 100,000 documents confidential, *id.* at 875 n.11, and defendant Hitachi designated an estimated 77,000 documents confidential, *id.* at 874 n.6. Indeed, plaintiff's final pretrial statement contained some 17,000 pages and cross-referenced some 250,000 documents. *Id.* at 873. Thus, Judge Becker clearly faced the prospect of reviewing hundreds of thousands of documents to decide the wholesale disclosure motion.

which in most cases will be a finite number.<sup>80</sup> Thus, the restraint applies not only until the court hears a challenge to a specified number of documents, but also for all time on most designated documents.

Notwithstanding the wishes of some courts to the contrary, the reality of the restraint will not go away. In an attempt to soften this reality, Judge Becker expressed "doubt that any judge would approve a consent order not demonstrably rooted in Rule 26(c)," <sup>81</sup> suggesting that courts should scrutinize consent orders to guard against invasion of first amendment rights. This solution, although commendable, is unrealistic. The principal problem with the solution is that the court has no method of obtaining the information it needs to undertake rigorous first amendment analysis. Ordinarily, the court has only the stipulated order before it. That order may, but probably will not, <sup>82</sup> contain recitations about the confidentiality of the protected materials. It is hardly likely, however, that the order will provide the requisite information for the court to rule on the confidentiality question. Neither the parties nor the court know at the time of stipulation which documents will later be designated confidential. Furthermore, bare assertions of counsel, such as recitations in the stipulated order, are said to be insufficient to support the issuance of protective orders.<sup>83</sup> Thus, reliance on recitations to support a protective order appears unjustified, even if the recitations are specific. Finally, it is not at all clear what a determination in conjunction with the signing of a stipulated order would actually decide. Although wholesale declassification is not a reasonable possibility, the court should not attempt to prejudge the appropriateness of individual designations. However particular the description, it is possible that a party will misuse the confidentiality stamp. Scrutiny of the first amendment issues at the stipulation stage is therefore not only time-consuming but unworkable.

In sum, parties may no longer rely on stipulated orders. A court cannot engage in the strict scrutiny requisite to entry of a valid order at the time stipulated orders are entered. To dispense with such scrutiny, however, renders the order vulnerable to later attack on those very same grounds, thereby undercutting the reliability of the order. A person confronted by a discovery request is, therefore, more likely to try to per-

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<sup>80</sup> It should be noted that even the *Halkin* court seemed to abjure the blanket declassification motion. After entry of an umbrella order, it sought to preserve only the right to seek declassification of "a particular document." See 598 F.2d at 196 n.47.

<sup>81</sup> 529 F. Supp. at 889 n.40. The *Halkin* majority seemingly made the same assumption. Thus, although he acknowledged that umbrella orders might be permissible in cases involving large numbers of documents, Judge Bazelon was careful to insist that such orders be entered only "on a proper showing." 598 F.2d at 196 n.47.

<sup>82</sup> Given the elasticity of the definition of confidentiality ordinarily encountered in stipulated protective orders, see *supra* note 45, it is unlikely that particularized recitations will be included.

<sup>83</sup> See 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2035, at 265 (1970).

suade the court to deny discovery altogether, thereby enmeshing the court and the parties in unwanted and unnecessary litigation. The threatened demise of the stipulated order thus promotes unnecessary discovery disputes.

### B. The Risk of Nondisclosure

The demise of the stipulated protective order not only threatens to impose unwanted disputes on the litigants and the courts, but also increases the risk that information that previously would have been disclosed will be withheld. Because such a result would strike at the very heart of the discovery scheme, it cannot be lightly disregarded. This risk exists for two reasons.

First, there will be an increase in attempts to persuade courts to deny discovery altogether on the ground that once information is produced no order can effectively protect its confidentiality. Some of these efforts will be successful. Although Judge Bazelon suggested in *Halkin* that a court may not deny a party the "statutory right of discovery" absent a showing that would justify a protective order,<sup>84</sup> he did acknowledge that no constitutional right to discovery exists.<sup>85</sup> Moreover, because the statutory right is explicitly limited by a court's rule 26(c) power to deny discovery, there is no doubt that courts may deny discovery they previously would have permitted. Thus, one district court, while declining to enter a protective order restraining the plaintiff's disclosure of matters already obtained through discovery, observed that "the penchant of the plaintiff to try her case in the media may become a consideration in determining the scope of discovery to be afforded her."<sup>86</sup> Other courts have echoed the same view.<sup>87</sup> Thus, by following the *Halkin* approach and limiting protective orders, courts may, ironically, undermine the traditional premise that "[t]he need for the information is held paramount."<sup>88</sup>

Second, the producing party may fail to disclose information as readily as in the past. Because of the broad scope of discovery, the temptation to evade it has always been great. Many a defendant has suspected that the plaintiff sought certain information more for ulterior

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<sup>84</sup> 598 F.2d at 190 n.27.

<sup>85</sup> *Id.* at 190.

<sup>86</sup> *Koster v. Chase Manhattan Bank*, 93 F.R.D. 471, 482 n.22 (S.D.N.Y. 1982). Interestingly, the court declined to enter the protective order in part because of constitutional limitations on its power to do so. Thus, the perceived impact of the first amendment on the court's power to restrict dissemination encouraged the judge to limit discovery.

<sup>87</sup> *See In re San Juan Star Co.*, 662 F.2d 108, 115 (1st Cir. 1981) ("If the trial judge were required to allow virtually full publicity of utterances forced from the mouth of an unwilling deponent . . . he might well refuse to allow the discovery to proceed at all . . .").

<sup>88</sup> *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 999 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965).

purposes than for trial preparation.<sup>89</sup> Indeed, one court has observed that the elimination of restrictions on disclosure of discovery material creates "substantial incentives for plaintiffs to depose well-known individuals who would not otherwise be deposed, or ask them questions that might not otherwise be asked."<sup>90</sup> The entry of a reliable protective order prohibiting misuse of information obtained through discovery both placates the person subject to discovery and reduces the temptation to disregard the obligation to produce the requested information. Undercutting the court's power and ability to enter such orders has the opposite effect.

Courts have a limited ability to deal with such admittedly contumacious behavior. Particularly when the person against whom discovery is sought is a nonparty, the temptation to withhold information is very great. Consider, for example, the nonparty witness served with a subpoena duces tecum by a competitor who is the defendant in an anti-trust case. The information sought may, in the witness's opinion, be highly sensitive and likely to enable the defendant competitor to gain an unfair competitive advantage. Can the courts blithely assume that this nonparty witness will comply with its discovery obligations? The common sense answer is no, and the courts understand this reality. The Second Circuit recently observed that "[u]nless a valid Rule 26(c) protective order is to be fully and fairly enforceable, witnesses relying upon such orders will be inhibited from giving essential testimony in civil liti-

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<sup>89</sup> See *Marrese v. American Academy of Orthopaedic Surgeons*, 706 F.2d 1488, 1495 (7th Cir. 1983) ("Discovery of sensitive documents is sometimes sought not in a sincere effort to gather evidence for use in a lawsuit but in an effort to coerce the adverse party, regardless of the merits of the suit, to settle it in order not to have to disclose sensitive materials.").

<sup>90</sup> *In re San Juan Star Co.*, 662 F.2d 108, 118 n.3 (1st Cir. 1981). It appears that the First Circuit's concerns in *San Juan Star* were warranted. The underlying lawsuit asserted that a number of law enforcement officials, including the Governor of Puerto Rico, had violated the civil rights of two terrorists who had been killed in a gun battle with police. The district court ultimately granted the Governor's motion for summary judgment and awarded him attorneys' fees under 42 U.S.C. § 1988 (Supp. V 1981), explaining in part as follows:

Finally, the Court observes that creating publicity and obtaining political advantage have been part of plaintiffs' motivation in bringing this case. The Court makes this finding based upon the approach taken by plaintiffs' counsel from the outset and the Court's observations of these proceedings. For example, during the early stages of the case, plaintiffs' counsel sought to depose the Governor on July 24, 1979, at the Puerto Rico Bar Association, at a time obviously calculated to create maximum publicity since it was immediately before the first anniversary of the shootout at which Soto and Rosado were killed. In addition, their counsel have frequently publicized information obtained through discovery in these proceedings and have apparently been in frequent contact with reporters. At the same time, they refused to agree to a protective order which would have given them access to discovery materials in August 1979; and they have unsuccessfully challenged routine protective orders and restrictions on the dissemination of information obtained during discovery.

*Soto v. Romero Barceló*, 559 F. Supp. 739, 741 (D.P.R. 1983) (footnote omitted).

gation.”<sup>91</sup> Indeed, there is some indication that the converse may also be true. For example, one trial court found that “defendants waived objections to interrogatories, and provided a fuller disclosure than might otherwise have been required of them, . . . all in reliance upon the entry and continuing effectiveness of the protective orders.”<sup>92</sup> It seems undeniable, then, that the eclipse of protective orders will not only cause courts to refrain from ordering production, but also will tempt persons to withhold information even in the face of court-ordered production.

### C. The Judicial Burden of Resolving Confidentiality Issues

The *Halkin* approach, by placing limitations on the trial court’s discretion to issue protective orders, is likely to breed protective order litigation. This Section analyzes the burdens on the courts in resolving these disputes, which may increase substantially.

Even without *Halkin*’s stringent requirements, the resolution of disputed confidentiality issues under the good cause standard is often an extremely time-consuming process for the parties and the court. Often courts require a particularized and specific factual demonstration before they will issue a protective order.<sup>93</sup> Thus, the party seeking such an order has the burden of making a substantial showing. Where the ground for issuance of the order is commercial confidentiality, the party seeking protection must often provide many details about the operation of the industry involved. Against that broad factual background, the party seeking protection must convince the court that the particular information sought is sensitive. This effort can require an elaborate explanation of how others schooled in the area can use seemingly innocuous data to derive insights into the producing party’s manner of operation. This process invariably discloses a fair amount of sensitive information, thereby highlighting the potential for abuse and providing the party seeking discovery with a roadmap for using the confidential information. More significantly, this educational process is difficult and time-consuming for the court. In some cases the court must review each document to decide, in light of its hard-won understanding of the industry, whether protection is appropriate.

Busy federal courts have little time for such undertakings.<sup>94</sup> The

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<sup>91</sup> *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 295 (2d Cir. 1979); *accord Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 254, 654 P.2d 673, 689 (1982), *cert. granted*, 52 U.S.L.W. 3261 (U.S. Oct. 4, 1983) (No. 82-1721). (“Parties . . . will be even more reluctant if they are not assured that the information which they give will be used only for the legitimate purposes of litigation. Many will be tempted to withhold information and even to shade the truth, where otherwise they would not do so.”).

<sup>92</sup> *Olympic Ref. Co. v. Carter*, 332 F.2d 260, 264 (9th Cir.), *cert. denied*, 379 U.S. 900 (1964).

<sup>93</sup> *See* 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2035, at 265 (1970) (citing cases).

<sup>94</sup> Indeed, concern about resolving discovery disputes is not limited to the federal courts;



complex cases in which protective orders are the norm already occupy a disproportionate share of courts' time.<sup>95</sup> The prospect of increasing that burden is not a happy one. One court, confronted with a request to declassify documents requiring individualized scrutiny of documents designated confidential, simply refused: "Some person would then be required to pass upon those justifications [for confidentiality]. I do not propose to be that person."<sup>96</sup> Judge Becker was equally emphatic in *Zenith*, asserting that "the burden of reviewing each document individually in order to determine whether its continuing confidential status is justified would be almost impossible to meet."<sup>97</sup> He concluded that a careful scrutiny in a complex case would make the judge "a veritable hostage" consigned to "years of adjudication of the confidentiality of individual documents."<sup>98</sup> The ten-week hearing required in *Zenith* to decide questions of admissibility of materials submitted in connection

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state courts have confronted similar issues. See, e.g., *Proposals to Minimize the Need for Court Intervention in the Discovery Process*, 37 REC. A.B. CITY N.Y. 535 (1982).

<sup>95</sup> See, e.g., Pollack, *supra* note 1, at 222. See generally W. SCHWARZER, *supra* note 40, at 1-16.

<sup>96</sup> *In re Coordinated Pretrial Proceedings in W. Liquid Asphalt Cases*, 18 Fed. R. Serv. 2d (Callaghan) 1251, 1252 (N.D. Cal. 1974). The court expanded on the time-saving purpose of the protective order while denying the motion to vacate the protective order: "The protective order was issued so that I would be spared the duty of deciding applications for protective orders during the course of the discovery. Massive quantities of documents have been furnished by defendants under the umbrella of the protective order and I have been spared such problems." *Id.*

<sup>97</sup> 529 F. Supp. at 874.

<sup>98</sup> *Id.* at 879 n.18. Consider the description by Professors Hazard and Rice of the problems involved in evaluating claims of privilege in *United States v. AT&T*, where they sat as special masters: "At the time of our appointment it was estimated that the documents being withheld on privilege grounds by the litigants and third parties numbered in the tens of thousands. The sheer volume of materials to be read and evaluated was overwhelming." Hazard & Rice, *supra* note 40, at 397. To cope with this burden, they established a fairly stringent set of procedural requirements for assertions of privilege that reduced the burden on them and increased the burden on the parties. See *id.* at 401-04. Nevertheless, in a period of 12 months they were called upon to rule on 4,320 claims of privilege. *Id.* at 404. All this effort was necessary even though the court had entered a protective order that applied to *all* material produced by third parties that the authors described as "[o]ne of the significant steps taken to expedite the production process." *Id.* at 398; see also *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1192 (D.S.C. 1974) (court describes resolution of privilege claims in antitrust case as "the most arduous task it has ever undertaken in its 26 years of public service"); *In re Uranium Antitrust Litig.*, 1983-1 Trade Cas. (CCH) ¶ 65,307 (N.D. Ill. 1982) (on motion to compel production of 40,000 allegedly privileged documents, court refused "to wade through the equivalent of 100 novels to determine the validity of the parties' blanket claims of privilege" and simply ordered all such documents produced); cf. *Ingle v. Department of Justice*, 698 F.2d 259, 264 (6th Cir. 1983) (describing potential burden of line-by-line review by courts in resolving disputes about application of exemptions to requests under the Freedom of Information Act). Although these cases are certainly not typical, they offer a troubling analogy because privilege issues at least involve legal principles that are more concrete than the standards for granting a protective order. Evaluating the needs of confidentiality would surely have placed much greater burdens on the adjudicators and the parties. See generally W. SCHWARZER, *supra* note 40, at § 3-6A to -6B (regarding burden of deciding discovery disputes).

with the defendants' summary judgment motion substantiates Judge Becker's assertion.<sup>99</sup>

The good cause standard, however, did offer some refuge from these burdens. Its inherent flexibility afforded substantial maneuvering room. For example, courts could easily make generalizations about types of documents, and they have generally presumed that certain categories of information, such as customer lists and detailed financial data, are entitled to protection.<sup>100</sup> Good cause, therefore, provided a workable framework. Although *Halkin* acknowledges that courts may relax its stringent standards to some extent in cases involving large numbers of documents,<sup>101</sup> its abandonment of the good cause standard will surely magnify the burden on the courts.

The *Halkin* approach requires a court, before entering a protective order, to complete a careful tripartite analysis of: (1) the nature of the harm posed by dissemination; (2) the particularity of the factual showing that such harm will occur; and (3) the availability of less intrusive alternatives.<sup>102</sup> Moreover, the second leg of this analysis is "constitutionally mandated when the order restricts expression,"<sup>103</sup> which would seem to be true in every case.<sup>104</sup> The court must also make adequate findings with regard to each leg of the analysis; indeed, the absence of such findings was the reason for the issuance of the writ of mandamus in *Halkin*. Thus, the *Halkin* approach not only rigidifies the court's task by constitutionalizing it, but also makes it considerably more onerous by insisting on particularized attention and detailed findings.

It is unclear whether the courts have, since *Halkin*, regularly hewed

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<sup>99</sup> See 529 F. Supp. at 880.

<sup>100</sup> See, e.g., *Chesa Int'l, Ltd. v. Fashion Assocs., Inc.*, 425 F. Supp. 234, 237 (S.D.N.Y.), *aff'd mem.*, 573 F.2d 1288 (2d Cir. 1977) (customer list); *Vollert v. Summa Corp.*, 389 F. Supp. 1348 (D. Hawaii 1975) (financial records); *Russ Stonier, Inc. v. Deoz Wood Co.*, 52 F.R.D. 232 (E.D. Pa. 1971) (customer list); *Corbett v. Free Press Ass'n*, 50 F.R.D. 179 (D. Vt. 1970) (financial records); *Hecht v. Pro-Football, Inc.*, 46 F.R.D. 605 (D.D.C. 1969) (financial records); *American Oil Co. v. Pennsylvania Petroleum Prods. Co.*, 23 F.R.D. 680 (D.R.I. 1959) (customer list).

<sup>101</sup> See 598 F.2d at 196 n.47.

<sup>102</sup> *Id.* at 191-96.

<sup>103</sup> *Id.* at 193 (citation omitted).

<sup>104</sup> It seems that Judge Bazelon meant to exclude some protective orders by limiting his constitutional edict to orders that "restrict expression," see *id.*, but such a limitation appears unrealistic. It is true that a court can phrase a protective order so that it less clearly addresses expression. For example, it can simply prohibit misuse (i.e., for business rather than litigation purposes) of information such as trade secrets rather than forbidding disclosure altogether. Nonetheless, the norm is to issue protective orders that limit the disclosure of confidential information. See *supra* text accompanying note 4. There is a good reason for this. Only by limiting dissemination can the court actually hope to guard against the prohibited use. Although it is theoretically possible for a court to forbid a person who has learned secrets through discovery from using them for purposes other than litigation, the policing problems are insurmountable. Thus, both parties and courts look to containing the information as the only practical method of protection. Accordingly, it is unlikely that a significant number of orders do not inhibit expression because free expression is precisely what they forbid.

its demanding line, but a review of some decisions suggests the kinds of difficulties that courts adopting the *Halkin* approach will encounter. Even before *Halkin*, the good cause standard was, itself, often extremely high. One court, for example, refused to issue a protective order covering materials containing information about revenues, sales, and manufacturing data sought from a nonparty on the ground that, although the information was "highly secret," it was not held "under a pledge of secrecy."<sup>105</sup> Since *Halkin*, however, such demands for extraordinary showings have surfaced more frequently. For example, one district court reasoned that *Halkin* required it to reject Exxon Corporation's designation of certain documents as confidential because Exxon had merely relied on "vague and conclusory generalizations."<sup>106</sup> The problem, the court explained, was that Exxon "does not explicate how *each* document will cause concrete harm" and "makes no effort to specify how individual documents will cause flagrant harm to Exxon's economic stature if released."<sup>107</sup> Thus a page by page showing of "flagrant harm" was held to be required for a protective order. Another district court denied a motion for a protective order in a products liability action, even though the defendant had shown that the Federal Drug Administration treated the information as a trade secret, that it was costly to produce or duplicate, and that it had not been publicly disclosed.<sup>108</sup> The court held that because the plaintiff was a user of the product rather than a competitor of the defendant, and because the defendant had not alleged that the plaintiff would "use the fruits of discovery for other than legitimate legal proceedings," the defendant had failed to demonstrate competitive injury.<sup>109</sup> In view of the argument that the parties may, in the absence of a protective order, make whatever use they desire of discovered material, and the existence of cases indicating that the parties may simply decide to market the trade secrets they obtain through discovery,<sup>110</sup> this court's conclusion is remarkable. Such a conclusion is, however, seemingly consistent with *Halkin*'s constitutional postulate that the party affected must make a particularized showing that the harm will occur.

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<sup>105</sup> *United States v. IBM*, 67 F.R.D. 40, 47 (S.D.N.Y. 1975). This decision was partly affected by the fact that the Publicity in Taking Evidence Act, 15 U.S.C. § 30 (1976), applied to this antitrust prosecution by the government, required a finding that the information would not be subject to a protective order unless it was so confidential that it would justify a closed trial. For a discussion of that statute see *infra* notes 159-68 and accompanying text. It is also noteworthy that the information involved came from nonparty witnesses, rather than parties.

<sup>106</sup> *United States v. Exxon Corp.*, 94 F.R.D. 250, 252 (D.D.C. 1981).

<sup>107</sup> *Id.* at 251 (emphasis in original).

<sup>108</sup> *Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27 (E.D. Mich. 1981).

<sup>109</sup> *Id.* at 29.

<sup>110</sup> See *National Polymer Prods. Co. v. Borg-Warner Corp.*, 641 F.2d 418 (6th Cir. 1981); cf. *In re Upjohn Co. Antibiotic Cleocin Prods.*, 81 F.R.D. 482, 484-85 (E.D. Mich. 1979) (plaintiffs' counsel proposed to sell information obtained to counsel for other plaintiffs suing on similar claims), *aff'd*, 664 F.2d 114 (6th Cir. 1981).

The central point is not that any of these courts erred in denying protection to the materials before them, but rather that the courts and litigants expended a great deal of energy on activities that did not advance the resolution of the litigation on the merits. Indeed, it appears that the courts that slavishly adhere to the *Halkin* requirements have made the requisite showing so difficult that it is often virtually impossible to obtain protective orders. Thus, the courts, after expending large amounts of time reviewing the matter, regularly deny protective order motions. This trend only increases the likelihood that parties seeking discovery who would previously have stipulated to protective orders will refuse, thereby compounding the burden on the courts of resolving matters irrelevant to the merits of the litigation.

#### D. Disclosure as an Impediment to Settlements

Far more cases are settled than tried. Commentators and judges increasingly recognize that facilitating settlements is a legitimate and desirable goal for courts to pursue.<sup>111</sup> The right of access approach imperils settlement efforts in two ways.

First, by undercutting the court's ability to assure a full exchange of information by entering an umbrella protective order, the stringent view of protective orders inhibits the untrammelled exchange of information between the parties. Although there is some question as to whether the exchange of information actually increases the likelihood of settlements,<sup>112</sup> many judges have concluded that it does.<sup>113</sup> Attempting to verify the intuitive and reasonable conclusion of judges that full disclosure aids the settlement process as it does the litigation process is proba-

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<sup>111</sup> Thus, the recent amendment to rule 16 explicitly directs that the pretrial hearing include discussion of "the possibility of settlement." FEDERAL RULES OF CIVIL PROCEDURE, reprinted in 97 F.R.D. 165, 170 (1983). The Advisory Committee notes suggest further that the court may "urge" the parties to explore private dispute resolution possibilities. Similarly, rule 68, relating to offers of judgment, provides an incentive to parties to accept formal settlement offers by imposing costs on them unless the ultimate judgment is more favorable than the offer. In August 1983, the Advisory Committee on the Civil Rules of the Judicial Conference of the United States proposed amendments to strengthen rule 68 as a device to promote settlements. See *Preliminary Draft of Proposed Amendments*, 712 F.2d xci, cxiii (1983). For a general discussion of the role of judges in the settlement process, see Tone, *The Role of the Judge in the Settlement Process*, in SEMINARS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES 57 (1975).

<sup>112</sup> Thus, in recommending amendments to rule 26 in 1970, including addition of subsection 26(c), the Advisory Committee on the Civil Rules relied on the field survey of the Project for Effective Justice of Columbia Law School for the following: "Discovery frequently provides evidence that would not otherwise be available to the parties and thereby makes for a fairer trial or settlement. On the other hand, no positive evidence is found that discovery promotes settlement." *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 485, 489-90 (1970).

<sup>113</sup> See, e.g., *Krause v. Rhodes*, 671 F.2d 212, 214 (6th Cir.) ("[T]he need for trial frequently disappears once both sides have a full and complete understanding of the facts."), cert. denied, 103 S. Ct. 54 (1982).

bly not worthwhile. Nonetheless, as long as there is even a possibility that those judges are right, it is counterproductive to foreclose attempts to facilitate settlement by invalidating or undercutting protective orders.

Second, the *Halkin* approach reduces or eliminates the possibility that effective limitations on disclosure can be made a part of a settlement package. A party may desire a settlement in part to avoid a trial at which confidential information will be disclosed. Such a party is likely to condition his willingness to settle upon the entry of a court order prohibiting the disclosure of the terms of the settlement or of information obtained through discovery. Indeed, the customary requirement that the discovering party return materials deemed confidential at the end of the litigation<sup>114</sup> assumes that post-litigation disclosure is forbidden. Such settlements may substantially reduce the burden on the courts. The Second Circuit, for example, recently affirmed a secrecy order entered to effect a settlement by the Federal Deposit Insurance Corporation in a suit against an accounting firm arising out of the failure of Franklin National Bank.<sup>115</sup> The court reasoned that the order was necessary to prevent a lengthy, bitterly contested trial,<sup>116</sup> and therefore rejected a public interest group's request to set aside the order. But if a court must justify judicial limitations on free expression by detailed findings, how much weight should be accorded the interest in avoiding such a trial? Is the waste of judicial resources resulting from disclosure a harm sufficient to justify the order? Unless the settling parties can assume that protective orders will not be subject to later attack by outsiders or adverse litigants, this avenue of settlement may also be blocked.<sup>117</sup>

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<sup>114</sup> See *supra* text accompanying note 48.

<sup>115</sup> Federal Deposit Ins. Corp. v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982) (*per curiam*). The challenge to the order was based on the Freedom of Information Act, not the constitutional or common law right of access.

<sup>116</sup> *Id.* at 231.

<sup>117</sup> In this connection, some mention should be made of two popular arguments that threaten to undermine further the ability of courts to enter confidentiality orders to effect settlement. First, courts often take a "dated matter" approach to material for which protection is sought. Essentially, courts employing this approach hold that if so much time has passed that once-confidential material no longer appears highly sensitive, the passage of time precludes a showing of good cause to justify the issuance of a protective order. Although this analysis makes sense in the initial determination whether to issue the order, it threatens mischief in the context of a motion to modify such an order because the party seeking disclosure can then argue that passage of time since production renders continued protection inappropriate. This logic would seem to undermine almost all confidentiality orders entered as part of a settlement package because a party could certainly assert that the passage of time had obviated the need for continuing protection of the materials. Thus, courts should apply the "dated matter" approach only to the initial determination of whether to issue a protective order *ab initio*.

Second, some courts point toward the prospect of disclosure at trial as a ground for limiting protective orders, reasoning that if the information will be disclosed at trial, the additional harm that results from earlier disclosure is insignificant. But the court cannot be sure in advance precisely which material will be admissible at trial. More significantly, this

## III

## REJECTING THE MYTH OF PUBLIC ACCESS

Many of the most troubling consequences of the public access approach result from the assumption that nonparties have some right to obtain discovery materials. This attitude is likely not only to foster litigation over protective orders and preclude settlements, but also to sanction lawsuits designed to obtain information rather than judicial relief. Part I demonstrated that the notion that all discovery takes place in public contradicts reality. This Part will show that the public access approach is also unsupported by legal authority. Accordingly, courts should reject the myth of general public access to discovery materials. In its place, this Part identifies the specific situations that justify non-party access.

## A. The "Public" Nature of Discovery

It is insufficient to demonstrate that discovery is not, in fact, public. Instead, resolution of the right to access issue requires analysis of recent decisions expounding a constitutional and common law right of access to proceedings and judicial records.<sup>118</sup> Although such an analysis does not demark the exact contours of these emerging doctrines, it does demonstrate that there is no persuasive legal support for an unfettered constitutional or common law right of general public access to civil discovery materials. Accordingly, there is no occasion to jettison reality in deference to new constitutional constructs.

The uncertain landmark in the area is *Richmond Newspapers, Inc. v. Virginia*,<sup>119</sup> in which the Supreme Court held an order excluding the public from a criminal trial invalid on first amendment grounds. Although the holding is relatively clear, discerning the rationale behind it is a difficult task in view of the six separate opinions filed in the decision—none of which commanded the support of more than three Justices. Some of the opinions argued that the Court had recognized a first amendment right for "the acquisition of newsworthy matter"<sup>120</sup> or a "privilege of access to governmental information,"<sup>121</sup> but the only cer-

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argument disregards the fact that most cases do not go to trial; if the standard is whether information would be secretly received in evidence at trial, rule 26(c) would be entirely swallowed by another set of standards relating to closing the trial itself.

<sup>118</sup> The distinction between the common law and constitutional rights, however much addressed, is somewhat ambiguous. The common law right is said to antedate the Constitution, whereas the first amendment right is of rather recent vintage. Yet, the latter is based on historical tradition. To avoid unnecessary complexity, this article will use them interchangeably.

<sup>119</sup> 448 U.S. 555 (1980).

<sup>120</sup> *Id.* at 582 (Stevens, J., concurring). Professor Archibald Cox explains Justice Stevens's assertion as "wishful thinking." Cox, *Freedom of the Press*, 1983 U. ILL. L. REV. 3, 19.

<sup>121</sup> *Id.* at 586 (Brennan, J., concurring in judgment).

tain principle emerging from the decision is the Court's holding that the first amendment guarantees the public and, derivatively, the press the right to attend criminal trials except where compelling reasons require that the trial be closed.

*Globe Newspaper Co. v. Superior Court*,<sup>122</sup> a 1982 decision in which the Court held that the public was improperly excluded from a trial of a sex offense during the testimony of the minor victim, provides useful insight into *Richmond Newspapers*. In *Globe Newspaper*, the trial court ordered the trial closed pursuant to a Massachusetts statute designed in part to encourage young victims to come forward with evidence of crimes. The Massachusetts Supreme Judicial Court held that the statute required that the trial be closed in every sex offense case during the victim's testimony. The court rejected a case-by-case analysis, asserting that a non-mandatory rule could undermine the statute's purpose because prospective complainants would not be assured the protection of the statute when deciding whether to come forward.<sup>123</sup>

The Supreme Court, emphasizing the state court's insistence on mandatory application of the statute, reversed.<sup>124</sup> Speaking through Justice Brennan, the Court synthesized the essence of *Richmond Newspapers* as follows:

Two features of the criminal justice system, emphasized in the various opinions in *Richmond Newspapers*, together serve to explain why access to *criminal trials* in particular is properly afforded protection by the First Amendment. First, the criminal trial historically has been open to the press and general public. . . .

Second, the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. [It] enhances the quality and safeguards the integrity of the factfinding process . . . fosters an appearance of fairness . . . [and] permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.<sup>125</sup>

Having thus explained the import of *Richmond Newspapers*, the Court in *Globe Newspaper* found that the state had failed to substantiate its interest in encouraging minor victims to come forward with evidence, in part because it did not introduce sufficient supporting empirical evidence.<sup>126</sup> In a passage particularly significant for civil protective orders,

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<sup>122</sup> 457 U.S. 596 (1982).

<sup>123</sup> *Globe Newspaper Co. v. Superior Court*, 1981 Mass. Adv. Sh. 1493, 1502-03, 423 N.E.2d 773, 779-80 (1981), *rev'd*, 457 U.S. 596.

<sup>124</sup> The majority opinion was joined by five Justices. Chief Justice Burger, Justice Rehnquist, and Justice Stevens dissented. Justice O'Connor concurred in the judgment.

<sup>125</sup> 457 U.S. at 605-06 (footnote omitted) (emphasis in original).

<sup>126</sup> See *id.* at 609-10. The Court also noted that the supposed state interest was contradicted by the fact that the press had access to the transcript of the victim's testimony. Com-

Justice Brennan suggested that the interests in promoting full disclosure probably could not outweigh the constitutional right of access in any event because "that same interest could be relied on to support an array of mandatory closure rules designed to encourage victims to come forward."<sup>127</sup> Consequently, the Court concluded that the state's argument "proves too much, and runs contrary to the very foundation of the right of access recognized in *Richmond Newspapers*: namely, 'that a presumption of openness inheres in the very nature of a criminal trial under our system of justice.'<sup>128</sup> Because the policy underlying protective orders—encouraging full disclosure by persons from whom information is sought in civil cases—is hardly more important than the societal interest in having crimes reported to the authorities, this reasoning bodes ill for the continued position of protective orders vis-a-vis the first amendment right of public access.

The critical issue, therefore, is whether the same right of access arguments apply to civil proceedings and, if so, whether these arguments are applicable to pretrial discovery as well as trial proceedings. At least one Justice believes that *Richmond Newspapers* applies only to criminal trials,<sup>129</sup> but there are many reasons to doubt this conclusion. Both features of the criminal justice system that the Court emphasized in *Globe Newspaper* are characteristic, to a substantial degree, of civil litigation as well. Civil trials, as Chief Justice Burger noted in his plurality opinion in *Richmond Newspapers*,<sup>130</sup> have traditionally been open to the public. More significantly, many of the societal interests said to support access to criminal trials are also implicated in civil trials. Although criminal justice admittedly plays a different and more newsworthy role in society than civil litigation, which is designed to resolve private disputes, the integrity of the factfinding process and public respect for the judicial process are important in the civil context as well. Some courts have

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pare Justice Brennan's opinion in chambers in *Capital Cities Media, Inc. v. Toole*, 103 S. Ct. 3524, 3526 (1983) (Brennan, J., in chambers), where he granted a stay of a state court order that prohibited disclosure of information about jurors in a criminal case: "I assume, for purposes of argument only, that the State has a compelling interest in keeping personal information about jurors confidential in an appropriate case, either to assure the defendant a fair trial or to protect the privacy of jurors." (citations omitted).

<sup>127</sup> 457 U.S. at 610.

<sup>128</sup> *Id.* (quoting *Richmond Newspapers*, 448 U.S. at 573).

<sup>129</sup> Concurring in the judgment in *Globe Newspaper*, Justice O'Connor announced that she would "interpret neither *Richmond Newspapers* nor the Court's decision today to carry any implications outside the context of criminal trials." *Id.* at 611.

<sup>130</sup> See 448 U.S. at 567-68 (citing 17th century writers who argued that all courts should be open for civil as well as criminal trials), 580 n.17 ("[H]istorically both civil and criminal trials have been presumptively open."); see also *id.* at 596 (Brennan, J., concurring in judgment) (analogizing "miscarriage of justice that imprisons an innocent accused" to "mistakes of fact in civil litigation"). For a more detailed exposition of the proposition that "the historical analysis [as to rights of access] . . . is equally applicable to civil and criminal cases," see *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979).



therefore concluded that *Richmond Newspapers* also establishes a right to attend civil trials.<sup>131</sup>

That conclusion does not mean that the Court would find the good cause standard an inadequate justification for pretrial protective orders. Indeed, the actual holding in *Globe Newspaper* suggests the contrary. In *Globe Newspaper*, the Court was most troubled by the automatic exclusion of the public under the Massachusetts court's interpretation of the state statute. Rejecting any automatic exclusion policy, the Court held that exclusion must be based upon an examination of the particular circumstances of the case in question.<sup>132</sup> That kind of individualized analysis is, of course, precisely what the rule 26(c) good cause standard is designed to promote.<sup>133</sup> Thus, the holding of *Globe Newspaper* appears to authorize a procedure similar to that employed for contested protective orders.

The interests the Court has cited as justifying public access to criminal trials also appear inapplicable to pretrial discovery in a civil case. Even in the criminal context, the Court permits limitations on public access to anything more than proceedings in open court during trial. In *Nixon v. Warner Communications*,<sup>134</sup> for example, the Court upheld Judge Sirica's refusal to allow various recording companies access to a number of Watergate tapes even though the government had introduced the tapes into evidence and played them during the criminal trial of John Mitchell and a variety of former White House officials. The Court concluded that the first amendment does not provide a right of access to evidence and held that courts can limit the common law right of access if it threatens to become a "vehicle for improper purposes."<sup>135</sup> Among

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<sup>131</sup> See, e.g., *Newman v. Graddick*, 696 F.2d 796, 800-01 (11th Cir. 1983); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 896 (E.D. Pa. 1981); *Fenner & Koley, Access to Judicial Proceedings: To Richmond Newspapers and Beyond*, 16 HARV. C.R.-C.L. L. REV. 415, 430 (1981); Note, *The First Amendment Right of Access to Government-Held Information: A Re-Evaluation After Richmond Newspapers, Inc. v. Virginia*, 34 RUTGERS L. REV. 292, 328 (1982); Recent Development, *The Public and Press Have a Right of Access to Criminal Trials Absent an Overriding Interest Articulated in Findings*, 26 VILL. L. REV. 183, 202 (1980).

The Court has already faced one abortive attempt to obtain a ruling that *Richmond Newspapers* requires public access to pretrial proceedings in civil cases. In *Cox Enters., Inc. v. Vascocu*, No. C-719 (Tex. Sept. 24, 1981), *cert. denied*, 455 U.S. 994 (1982), the trial court in a civil case initially closed a pretrial hearing to avoid prejudicial publicity. See *Petition for Writ of Certiorari to the Supreme Court of Texas at 3, Cox Enters., Inc. v. Vascocu*, No. 81-1154 (1982). The trial court thereafter reopened the proceedings, apparently mooting the issue. See *Brief in Opposition at 3-4, Cox Enters., Inc. v. Vascocu*, No. 81-1154 (1982).

<sup>132</sup> See 457 U.S. at 608 & n.20.

<sup>133</sup> See *supra* notes 5-9 and accompanying text.

<sup>134</sup> 435 U.S. 589 (1978).

<sup>135</sup> *Id.* at 598. The Court cited a number of state court decisions, described *infra* note 136, that it characterized as legitimately denying access to public records that might be "used to gratify private spite," "serve as reservoirs of libelous statements for press consumption" or "as sources of business information that might harm a litigant's competitive standing." 435 U.S. at 598. Although the contours of this power to limit access are unclear, the

the examples of such limitations the Court cited with apparent approval was a 1917 state court decision sealing a deposition and enjoining disclosure of the contents.<sup>136</sup> Thus, one may infer that the Court implicitly authorized the sealing of discovery materials, as well as restraints on the disclosure of discovered information, in certain circumstances.

In *Gannett Co. v. DePasquale*,<sup>137</sup> a 1979 decision, the Court upheld the closing of a pretrial suppression hearing in a criminal case to protect

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litany of examples the Court provided is certainly informative by way of analogy for interpretation of rule 26(c). If there is an accepted history that would allow limitations on access even to public records in such circumstances, it would seem that the power to restrict access to discovery materials must be equally broad.

<sup>136</sup> King v. King, 25 Wyo. 275, 168 P. 730 (1917). The court there entered its order after the deposition was filed as part of a stipulated judgment. *Id.* at 280, 168 P. at 731. The other cases cited by the Court, 435 U.S. at 498, were: C. v. C., 320 A.2d 717, 723 (Del. 1974) (court, noting that "civil litigation is not infrequently merely a means to resolve private disputes . . . [but that] [s]uch cases or portions of such cases may or may not be of legitimate and reasonable public interest," reversed trial court's decision allowing newspaper to obtain access to sealed file in divorce case after completion of closed trial); Sanford v. Boston Herald-Traveler Corp., 318 Mass. 156, 158, 61 N.E.2d 5, 6 (1945) (court, noting that under Massachusetts law "the right to report proceedings in the courts does not extend to reporting accusations contained in papers filed by a party and not yet brought before a judge or magistrate for official action," sustained libel action for newspaper report of accusations contained in pleadings); Schmedding v. May, 85 Mich. 1, 4, 48 N.W. 201, 202 (1891) (court, in denying application by newspaper for access to pleadings in civil cases sealed by court order, distinguished between reports relating to final judgments and pretrial matters, emphasizing that "[t]hese suits involve private dealings between private parties"); Park v. Detroit Free Press Co., 72 Mich. 560, 40 N.W. 731 (1888) (libel claim against newspaper for erroneous report concerning bastardy proceeding upheld); Flexmir, Inc. v. Herman, 40 A.2d 799, 800 (N.J. Ch. 1945) (court removed sensitive matter from court file in action to enjoin misuse of secret processes); Munzer v. Blaisdell, 268 A.D. 9, 48 N.Y.S.2d 355 (1944) (court indicating that complaint reciting libelous assertions could be sealed); *In re Caswell*, 18 R.I. 835, 29 A. 259 (1893) (reporter denied access to record in divorce case).

Finally, in *Cowley v. Pulsifer*, 137 Mass. 392 (1884), the Massachusetts court refused to allow a newspaper sued for libel for reporting charges made against the plaintiff in a petition filed in court to rely on the privilege of reporting judicial proceedings. Speaking through Justice Holmes, it emphasized the distinction between the reporting of trial and pretrial matters:

It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

If these are not the only grounds upon which fair reports of judicial proceedings are privileged, all will agree that they are not the least important ones. And it is clear that they have no application whatever to the contents of a preliminary written statement of a claim or charge. These do not constitute a proceeding in open court. Knowledge of them throws no light upon the administration of justice.

*Id.* at 394.

In sum, the cases cited by the Court in *Nixon v. Warner Communications* confirm the general understanding set forth in Part I that pretrial proceedings are analytically distinct from actual trial proceedings for purposes of public disclosure and that material disclosed in private litigation, even if filed in court, is not presumptively public.

<sup>137</sup> 443 U.S. 368 (1979).

the defendant's interest in a fair trial. The central argument for access was based on the sixth amendment right to a public trial in criminal cases, and the Court rejected the sixth amendment argument while reserving ruling on first amendment issues.<sup>138</sup> The case nevertheless is important in evaluating access to pretrial discovery in civil cases. The Court reasoned that "our adversary system of criminal justice is premised upon the proposition that the public interest is fully protected by the participants in the litigation."<sup>139</sup> With respect to the common law right of access, the Court emphasized that "pretrial proceedings . . . were never characterized by the same degree of openness as were actual trials."<sup>140</sup> Even with respect to criminal trials, then, the Court has upheld limitations on access to evidence introduced at trial and found even highly important pretrial proceedings involving critical judicial decisions<sup>141</sup> subject to lesser rights of access than the actual trial itself.

In addressing another aspect of the criminal justice system, the Court has more readily denied a public right of access. Three times recently it has held that the press and public have no first amendment right of access to prisons to observe or report on conditions there.<sup>142</sup>

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<sup>138</sup> The court held that even if such a right exists, the trial judge—who acted under such an assumption—had made findings sufficient to justify closure. *See id.* at 392-93. In *United States v. Edwards*, 430 A.2d 1321, 1344-45 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982), the court held that *Richmond Newspapers* recognized a first amendment right to attend pretrial hearings in court in criminal cases; *see also* *Associated Press v. United States Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (reversing trial court order sealing all pretrial documents in widely publicized narcotics prosecution); *United States v. Brooklier*, 685 F.2d 1162, 1170 (9th Cir. 1982) (finding district court erred in closing pretrial suppression hearing but that error did not merit mandamus); *United States v. Dorfman*, 550 F. Supp. 877, 884-86 (N.D. Ill. 1982) (public has right to review documents sealed during pretrial suppression hearing); *State v. Williams*, 459 A.2d 641, 647-51 (N.J. 1983) (public has right of access to bail hearing and to probable cause hearing).

<sup>139</sup> 443 U.S. at 384.

<sup>140</sup> *Id.* at 387-88. Chief Justice Burger was even more definite on the question of discovery in his concurring opinion:

[D]uring the last 40 years in which the pretrial processes have been enormously expanded, it has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants. A pretrial deposition does not become part of a "trial" until and unless the contents of the deposition are offered in evidence.

*Id.* at 396 (Burger, C.J., concurring).

<sup>141</sup> As Justice Powell noted in his concurring opinion, "[i]n our criminal justice system as it has developed, suppression hearings often are as important as the trial which may follow . . . In view of the special significance of the suppression hearing, the public's interest in this proceeding often is comparable to its interest in the trial itself." *Id.* at 397 n.1 (Powell, J., concurring). It is difficult to rebut this argument if one emphasizes the importance of observing the judiciary at work. The situation is, however, vastly different with pretrial civil discovery. *See infra* text accompanying notes 169-70.

<sup>142</sup> In each case the principal argument advanced in support of the claimed right of access was that the first amendment gave the press, as a representative of the public, a right to gather information in public possession in order to facilitate reporting on governmental activities to the public. In *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (4-3 decision), a broadcasting station claimed the right to bring cameras into a county jail. The Court held that the

Even though prisons are also a part of the criminal justice system, the Court concluded that such facilities, unlike courtrooms, have not traditionally been open to the public.<sup>143</sup> As in *Richmond Newspapers*, these cases fragmented the Court; none offered a majority opinion to which five Justices subscribed, and in each there was a vigorous dissent. The dissents, however, provide no grounds for implying a constitutional right of public access to civil pretrial discovery. Instead, they argued that prisons are public institutions, giving the public a legitimate interest in being informed about what goes on inside them,<sup>144</sup> particularly when the information sought is not confidential.<sup>145</sup> More significantly, these dissents emphasized the role prisons play in the judicial system as the ultimate destination of many defendants after criminal trials to which the public does have a right of access.<sup>146</sup> Despite these interests, emanating in part from the connection between prisons and criminal trials, the Court in each instance rejected the claim that the first amendment created a public right of access. Although some may question the rea-

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press, similar to the rest of the public, had no such right. In *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974), the Court upheld the refusal of federal prison officials, pursuant to the Policy Statement of the Federal Bureau of Prisons, to grant the media interviews with specified prisoners. In *Pell v. Procunier*, 417 U.S. 817 (1974), the Court upheld a similar provision in the regulations of the California Department of Corrections.

<sup>143</sup> See, e.g., *Saxbe v. Washington Post Co.*, 417 U.S. 843, 849 (1974). In *Richmond Newspapers*, Chief Justice Burger's plurality opinion distinguished these cases on the ground that "they were concerned with penal institutions which, by definition, are not 'open' or public places." 448 U.S. at 576 n.11; cf. *Greer v. Spock*, 424 U.S. 828 (1976) (exclusion of civilian from military base); *Adderley v. Florida*, 385 U.S. 39 (1966) (affirming convictions of persons who staged demonstration in nonpublic part of jail).

<sup>144</sup> See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1, 37-38 (1978) (Stevens, J., dissenting) (asserting that "[s]ociety has a special interest in ensuring that unconvicted citizens are treated in accord with their status" and emphasizing "the special importance of allowing a democratic community access to knowledge about how its servants were treating some of its members"); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 861 (1974) (Powell, J., dissenting) (observing that because federal prisons are public institutions, their internal administration, "the effectiveness of their rehabilitative programs, the conditions of confinement that they maintain, and the experiences of the individuals incarcerated therein are all matters of legitimate societal interest and concern"); *Pell v. Procunier*, 417 U.S. 817, 840 (1974) (Douglas, J., dissenting) ("Prisons, like all other public institutions, are ultimately the responsibility of the populace . . . . The public's interest in being informed about prisons is thus paramount.").

<sup>145</sup> See *Saxbe v. Washington Post Co.*, 417 U.S. 843, 861 (1974) (Powell, J., dissenting) ("Respondents do not assert a right to force disclosure of confidential information . . .").

<sup>146</sup> See *Houchins v. KQED, Inc.*, 438 U.S. 1, 36-37 (1978) (Stevens, J., dissenting) (footnotes omitted):

The reasons which militate in favor of providing special protection to the flow of information to the public about prisons relate to the unique function they perform in a democratic society. Not only are they public institutions, financed with public funds and administered by public servants, they are an integral component of the criminal justice system . . . . It is important not only that the trial itself be fair, but also that the community at large have confidence in the integrity of the proceeding. That public interest survives the judgment of conviction and appropriately carries over to an interest in how the convicted person is treated during his period of punishment and hoped-for rehabilitation.

soning of these cases,<sup>147</sup> they hardly portend the unveiling of a constitutional right of access to civil discovery.

The Court has shown no inclination to take a broader view of first amendment or common law rights of access in civil cases. To the contrary, it has raised no objections to the protective orders it has encountered in the civil litigation arena. In one civil case, the Court did not object to a restrictive protective order that may even have been significant to the Court's decision not to grant mandamus to overturn the discovery ruling at issue.<sup>148</sup> Even Justices Douglas and Brennan, two of the most energetic advocates of first amendment freedoms, have relied on the availability of protective orders as a basis for refusing to stay lower court orders compelling discovery.<sup>149</sup> Thus, Supreme Court holdings do

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<sup>147</sup> Professor Van Alstyne, for example, has argued that *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), is based on "rather unconvincing administrative objections to press access." Van Alstyne, *The First Amendment and the Free Press: A Comment on Some New Trends and Some Old Theories*, 9 HOFSTRA L. REV. 1, 2 (1980).

<sup>148</sup> *Kerr v. United States Dist. Court*, 426 U.S. 394 (1976). Plaintiff state prisoners challenged the length of detention by the California Adult Authority and sought production of various materials about members and employees of the Adult Authority. Although the defendants claimed that the materials were confidential, the district court ordered the materials produced subject to a protective order that limited access to counsel of record for the plaintiffs. *Id.* at 398. The Ninth Circuit refused to overturn the district court's ruling on petition by defendants for a writ of mandamus. Even though the plaintiffs withdrew their request for the materials in question before the Supreme Court issued its decision, *id.* at 401 n.5, the Court nonetheless proceeded with the case and affirmed the Ninth Circuit's ruling. The Court's reasoning focused on the possibility that a lower court could conduct an in camera review of the documents. It felt that such a procedure would avoid unneeded disclosure of the documents. *See id.* at 405-06. One suspects that it would indeed have surprised the Court to suggest that the protective order did not afford protection even the defendants deemed inadequate; in all likelihood, the Court would have more favorably considered the petition under those circumstances.

The possibility that the protective order in *Kerr* would be invalid under *Halkin* is not fanciful, however. In *Phillips v. District of Columbia*, No. 80-2171, slip op. (D.C. Cir. Jan. 11, 1983), the court invalidated a protective order under similar circumstances. The plaintiffs in *Phillips* were also prisoners challenging their conditions of confinement. They objected to discovery sought by the defendant corrections officials on the ground that the officers at the institution might learn of the information thereby exposing them to the risk of reprisal. *Id.* at 3-4. The trial court ordered responses to the discovery but issued a protective order limiting the availability of the information to counsel. On appeal from a judgment for the plaintiffs, the court held that the order was impermissible under *Halkin* because it interfered with communication between the defendants and their attorneys. The court noted that an order forbidding disclosure of the information to guards or inmates would have sufficed. *Id.* at 10.

<sup>149</sup> In *Reproductive Servs., Inc. v. Walker*, 439 U.S. 1307, 1309 (1978) (Brennan, J., in chambers), Justice Brennan dissolved a stay of discovery seeking the identity of other abortion patients in a malpractice action "on express condition that the parties agree to a protective order ensuring the privacy of patients at applicant's clinics." Similarly, in *Chamber of Commerce v. Legal Aid Soc'y*, 423 U.S. 1309, 1312 (1975) (Douglas, J., in chambers), Justice Douglas denied an application for a stay of an order compelling production of certain documents in part because a protective order had been entered: "Applicant will not suffer irreparable injury from disclosure of the documents because the District Court has entered a protective order permitting only attorneys for the Legal Aid Society to examine the assertedly privileged documents."

not directly support employing the first amendment as an impediment to the entry of protective orders in civil discovery. To the contrary, the only Supreme Court decision directly considering the impact of the first amendment on discovery in a civil case held that, far from requiring access, the first amendment prohibited compelled disclosure of the membership lists of the NAACP because that would chill freedom of association.<sup>150</sup>

Although dicta in the Supreme Court's first amendment right of public access cases thus provide some ammunition to those seeking public access to pretrial discovery in civil cases, the Court's actual decisions belie that result. The Court has rested its decisions upholding the right of access to criminal trials on the two prongs: the tradition of public access and the value of access as a means of heightening public respect for the judicial process and permitting public scrutiny of judicial performance. An analysis of these two prongs confirms that these cases do not apply to civil discovery.

First, as demonstrated in Part I, there simply is no tradition of public access to discovery; in reality, the practice is to the contrary. Legal authority provides little guidance and in no way undercuts the reality of privacy. Two of the Federal Rules of Civil Procedure are pertinent. Rule 43(a) provides that, except in extraordinary circumstances, "[i]n all trials, the testimony of witnesses shall be taken orally in open court."<sup>151</sup> This rule was a reaction to the closing of depositions in equity practice, where the parties frequently substituted depositions for the trial testimony of the witness.<sup>152</sup> The provisions of rule 43(a) obviously render the question of a constitutional right to attend civil trial in federal court academic, but other trial related proceedings, such as discussions of the law between court and counsel, may still be private.<sup>153</sup> Certainly, rule 43(a) implies nothing about pretrial discovery. Although

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<sup>150</sup> In *NAACP v. Alabama*, 357 U.S. 449 (1958), the lower court ordered the NAACP to produce various records, including membership lists, in connection with a proceeding filed by the Alabama Attorney General that asserted that some NAACP-sponsored activities had violated Alabama law. *Id.* at 453. When it refused to produce the membership lists, the court held the NAACP in contempt. The Supreme Court reversed on the ground that compelled disclosure of membership lists would violate the members' first amendment freedom of association. For a more recent decision holding that civil discovery violates the first amendment, see *Britt v. Superior Court*, 20 Cal. 3d 844, 574 P.2d 766, 143 Cal. Rptr. 695 (1978) (order compelling disclosure of plaintiff's private associational affiliations and activities infringed on his first amendment rights). For a discussion of the use of protective orders to guard against invasion of protected rights of association, see Steinmann, *Privacy of Association: A Burgeoning Privilege in Civil Discovery*, 17 HARV. C.R.-C.L. L. REV. 355, 429-34 (1982).

<sup>151</sup> FED. R. CIV. P. 43(a). Similar provisions existed in federal law before the promulgation of the Federal Rules. See Judiciary Act of 1789, ch. 20, § 30, 1 Stat. 88.

<sup>152</sup> See 9 C. WRIGHT & A. MILLER, *supra* note 2, § 2407 (1971).

<sup>153</sup> Cf. *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 605 (3d Cir. 1969) (conferences between court and counsel outside presence of jury); *People v. Teitlebaum*, 163 Cal. App. 2d 184, 206-07, 329 P.2d 157, 171-72 (1958) (same), *cert. denied*, 359 U.S. 206 (1959).

some courts rejecting protective order arguments have cited rule 43(a) as indicative of the public nature of discovery,<sup>154</sup> the rule is actually nothing more than a statement of the public nature of the trial itself.

More significantly with respect to pretrial discovery, rule 77(b) provides that, while trials on the merits shall be in open court, "[a]ll other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place either within or without the district."<sup>155</sup> As to any judicial act other than a trial on the merits, then, the judge may exclude the public and proceed in chambers. The judge may make any interlocutory order, based on such nonpublic proceedings, in his chambers as well.<sup>156</sup> In *Zenith*, for example, Judge Becker closed part of a preliminary evidentiary hearing and excluded a spectator from another pretrial hearing.<sup>157</sup> More generally, courts conduct critical pretrial hearings by telephone with increasing frequency.<sup>158</sup> Such procedures obviously foreclose public access. If the rules authorize the court to exclude the public from pretrial hearings that result in judicial action, one cannot seriously contend that there is a tradition of public access to deposition proceedings in lawyers' offices that involve neither public notice nor judicial involvement.

The Publicity in Taking Evidence Act of 1913,<sup>159</sup> the only authority dealing directly with access to deposition proceedings, confirms this

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<sup>154</sup> See, e.g., *Olympic Ref. Co. v. Carter*, 332 F.2d 260, 264 (9th Cir. 1964), *cert. denied*, 379 U.S. 900 (1966); *Essex Wire Corp. v. Eastern Elec. Sales Co.*, 48 F.R.D. 308, 310 (E.D. Pa. 1969).

<sup>155</sup> FED. R. CIV. P. 77(b).

<sup>156</sup> See 7 J. MOORE & J. LUCAS, *MOORE'S FEDERAL PRACTICE* ¶ 77.03 (2d ed. 1972); 12 C. WRIGHT & A. MILLER, *supra* note 2, § 3082 (1973).

<sup>157</sup> 529 F. Supp. at 879 & n.19; see also *Standard & Poor's Corp. v. Commodity Exch., Inc.*, 541 F. Supp. 1273 (S.D.N.Y. 1982) (closing portion of hearing on motion for preliminary injunction); cf. *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983) (ordering press access to pretrial hearings in civil rights action challenging overcrowding in prison).

<sup>158</sup> For a description of Judge Becker's use of telephonic pretrial hearings in the *Zenith* case, which he labeled "[t]he principal vehicle for getting this case organized for trial," see Becker, *Organization for Trial in Antitrust Cases*, 51 ANTITRUST L.J. 239, 241 (1982). Courts may use telephone conferences to resolve a variety of critical pretrial matters. See, e.g., *Kohn v. American Metal Climax, Inc.*, 458 F.2d 255, 275 (3d Cir.) (noting that trial court had decided motion to enjoin shareholder vote during telephone conference), *cert. denied*, 409 U.S. 874 (1972). Consistent with this trend, rule 16 now provides that a judge may schedule discovery after telephone consultation with the parties. See *FEDERAL RULES OF CIVIL PROCEDURE*, reprinted in 97 F.R.D. 165, 168 (1983).

<sup>159</sup> Act of March 3, 1913, ch. 114, 37 Stat. 731 (codified at 15 U.S.C. § 30 (1982)). For another example of a special rule designed to enhance the government's ability to enforce federal regulatory laws, see § 21(e) of the Securities Exchange Act of 1934, ch. 404, 48 Stat. 881, 900 (codified as amended at 15 U.S.C. § 78u(d) (1982)), which provides that the SEC may share information in its possession with the Attorney General. Some courts have held that this provision precludes entry of a rule 26(c) protective order forbidding such transmittal of information to the Attorney General. See, e.g., *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1384-87 (D.C. Cir.) (en banc), *cert. denied*, 449 U.S. 993 (1980); *SEC v. Rubinstein*, 95 F.R.D. 529 (S.D.N.Y. 1982).

impression. This little-known statute provides that depositions in anti-trust suits brought by the United States "shall be open to the public as freely as are trials in open court." A review of the origin and history of the Act undercuts the argument that there is a traditional right of public access to depositions. The statute was prompted by a 1912 district court decision granting the defendant's motion to exclude outsiders from a deposition on the ground that "by common understanding of the bar and bench the taking of depositions is a private and not a public proceeding."<sup>160</sup> The Attorney General proposed the statute in response to that decision. The bill passed after vigorous debate.<sup>161</sup> At that time, however, depositions were permitted only in unusual circumstances as a substitute for live testimony at trial. The House Report in support of the bill explained that "the master is, in effect, a travelling court."<sup>162</sup> This practice prompted rule 43(a)'s requirement that testimony at trial be public; the statute was not designed to ensure public access to genuine discovery depositions, which were not generally available in 1913.<sup>163</sup> More significantly, the proponents of the bill acknowledged that the 1912 district court decision was within the court's power and did not claim that the court had erred in its characterization of the "common understanding of the bar and bench" that depositions are private.<sup>164</sup>

Not surprisingly, courts have rarely invoked the statute since 1913. It applies only in antitrust proceedings when the government is the

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<sup>160</sup> *United States v. United Shoe Mach. Co.*, 198 F. 870, 874 (D. Mass. 1913). For a more recent expression of this view see *State v. Dolen*, 390 So. 2d 407, 409 (Fla. Dist. Ct. App. 1980) (court denied access to defendant to deposition of complaining witness in criminal case, noting that "[t]he scope of the 'trial' has not been extended to discovery depositions as they are not true judicial proceedings") (footnote omitted); *Ocala Star Banner Corp. v. Sturgis*, 388 So. 2d 1367, 1371 (Fla. Dist. Ct. App. (1980) ("The taking of a deposition itself can hardly be categorized as a 'judicial proceeding' for the simple reason that no judge is present, and no rulings or adjudications of any sort are made by judicial authority.").

<sup>161</sup> Some representatives made statements urging the House to permit access in all cases. See 49 CONG. REC. 2511 (1913) (remarks of Rep. Mann) ("I would like to encourage the Supreme Court to make rules all along the line of procedure and provide a rule that would not only prevent depositions under the trust law being secret, but prevent the taking of any depositions in secret.") Others opposed any mandatory openness. See *id.* at 4622 (remarks of Rep. Kahn) ("The consequence will be that a shrewd attorney can worm out trade secrets, can worm out secret processes of manufacture from a willing or indifferent witness . . . .") The debate became rather excited. See *id.* at 4626 (remarks of Rep. Mann) ("There can be no valid objection to the passage of this bill [applause] except by some one who fears he will be injured by it, not because he ought not to be injured, but because he hopes to derive some benefit from sneaking in the dark. [Applause] [Cries of 'Vote!'].") Ultimately the bill passed as requested by the Attorney General.

<sup>162</sup> H.R. REP. NO. 1356, 62d Cong., 3d Sess. 1 (1913); see also 49 CONG. REC. 2511 (1913) (remarks of Rep. Norris) ("Almost universally in these cases practically all of the evidence is taken by the master and taken at various places.").

<sup>163</sup> See generally F. JAMES & G. HAZARD, *CIVIL PROCEDURE* § 6.1 (2d ed. 1977).

<sup>164</sup> See 49 CONG. REC. 4621 (1913) (remarks of Rep. Norris) ("There is no doubt from the reading of the briefs, and from the opinion of the court, that the court had the right under the law to decide in its discretion as it did. It was not error.").



plaintiff,<sup>165</sup> and only to depositions.<sup>166</sup> Even where the statute does apply, courts have held that it permits an order closing depositions involving allegedly confidential matter,<sup>167</sup> and allows protective orders sealing the record of government antitrust actions.<sup>168</sup> Far from substantiating the traditional openness of pretrial civil discovery, the history and application of the statute prove the reverse.

Second, the Court also has stressed access as a means of heightening public respect for the judicial process and permitting public scrutiny of judicial performance. This concern has little application in the pretrial discovery context. Indeed, one objection to allowing public access to pretrial discovery is that in most cases no judge is present to rule on the propriety of the inquiry being pursued.<sup>169</sup> Instead, the interrogator is allowed to range far afield; some courts even have held that an attorney may be sanctioned for trying to stop inquiry into irrelevant areas by instructing the witness not to answer.<sup>170</sup> A person observing a deposition would garner only minimal insight into judicial decisionmaking. Indeed, allowing public access might undermine public respect for the process. There is thus no persuasive argument that this prong of the Supreme Court's analysis justifies granting the public access to pretrial discovery.

Upon close analysis, then, the evolving constitutional and common law doctrines of right of access to certain judicial proceedings simply do not and should not apply to pretrial discovery in civil cases. As Justice Stewart observed in a 1974 speech: "The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act."<sup>171</sup> There is no

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<sup>165</sup> See *D'Ippolito v. American Oil Co.*, 272 F. Supp. 310, 312 (S.D.N.Y. 1967).

<sup>166</sup> See *United States v. United Fruit Co.*, 410 F.2d 553, 556 (5th Cir.), *cert. denied*, 396 U.S. 820 (1969). *But cf.* *Olympic Ref. Co. v. Carter*, 332 F.2d 260, 264 (9th Cir. 1964) ("While this statute does not expressly apply to the acquisition of information by means of interrogatories or subpoenas duces tecum, the policy behind the enactment is equally applicable to these forms of discovery."), *cert. denied*, 379 U.S. 900 (1965).

<sup>167</sup> See *United States v. IBM*, 67 F.R.D. 40, 43 (S.D.N.Y. 1975). In such cases, the court makes a later determination of whether to release the transcript to the public.

<sup>168</sup> See *United States v. United Fruit Co.*, 410 F.2d 553, 556 (5th Cir.), *cert. denied*, 396 U.S. 820 (1969). Some district courts have exercised their discretionary authority by issuing protective orders to seal some or all of the record in such actions. See *United States v. American Optical Co.*, 39 F.R.D. 580 (N.D. Cal. 1966); *United States v. Lever Bros. Co.*, 193 F. Supp. 254 (S.D.N.Y. 1961), *appeal dismissed*, 371 U.S. 207 (1962).

<sup>169</sup> See, e.g., *In re San Juan Star Co.*, 662 F.2d 108, 115 (1st Cir. 1981) ("[A] judicially-powered process compelling information that has not yet passed through the adversary-judicial filter for testing admissibility does not create communications that deserve full [first amendment] protection."); cf. 49 CONG. REC. 4622 (1913) (remarks of Rep. Kahn) ("[A]lthough the attorney upon the other side may make an objection against any particular question . . . still the witness is bound to answer.").

<sup>170</sup> See *supra* note 35 and accompanying text.

<sup>171</sup> Stewart, *Or Of the Press*, 26 HASTINGS L.J. 631, 636 (1975), *quoted in* *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978); see also *Krause v. Rhodes*, 535 F. Supp. 338, 348 (N.D. Ohio 1979) ("The policy of 'open file' discovery was not intended to serve as a vehicle to enlarge the public domain, laudable though that goal is. To permit the discovery process to

reason for perpetuating the myth that pretrial discovery is public. To the extent that any decision concerning the availability of a protective order depends upon that myth, it is flawed.

## B. Situations Warranting Nonparty Access to Discovery Materials

Although no basis exists for unrestrained public access to discovery materials, there are situations that justify nonparty access, and sometimes even general public access. Specifically, such access may be justified when litigants seek to obtain evidence relevant to other litigation, when a court bases pretrial decisions on discovery materials, and, in certain extraordinary cases, when there is a strong public interest in the alleged governmental misconduct that is the subject of the suit. Despite their broad language, almost all cases that authorize nonparty access to materials produced under protective orders fall into one of these categories. That the categories can be narrowly drawn, and that cases falling within these categories do not automatically warrant disclosure, confirm that unrestrained public access is actually a myth.

### 1. *Use in Other Litigation*

By far the most important justification for granting nonparties access to discovery information is their need to use the information in other litigation. The issue generally arises when a nonparty asks the court that entered a protective order<sup>172</sup> to modify the order to permit disclosure to him. Under these circumstances, modification furthers, rather than undermines, the policies underlying rule 1. The Supreme Court recognized the propriety of granting access to material covered by a protective order for use in other litigation in 1915 in *Ex parte Up- percu*.<sup>173</sup> The petitioner in *Uppercu* claimed a right of access to depositions sealed as part of the settlement decree in an earlier case, intending to use them to defend himself in a related action. The Court, speaking through Justice Holmes, agreed: "So long as the object physically exists, anyone needing it as evidence at a trial has a right to call for it . . . however proper and effective the sealing may have been as against the public at large."<sup>174</sup> The wisdom of this approach is confirmed by the

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serve that extraneous purpose would not encourage its acceptance or improve the 'functioning of the discovery process.'"), *aff'd*, 671 F.2d 212 (6th Cir.), *cert. denied*, 103 S. Ct. 54 (1982).

<sup>172</sup> Generally, the nonparty must obtain a modification of the order from the court that entered the order, rather than seeking to have another court order disclosure of the information. See *United States v. ARA Servs., Inc.*, 1978-2 Trade Cas. (CCH) ¶ 62,250 (E.D. Mo. 1978) (refusing to order production of all materials covered by protective order entered by another court); *cf. Douglas Oil Co. v. Petrol Shops Northwest*, 441 U.S. 211 (1979) (requiring that application for access to grand jury transcripts under Federal Rule of Criminal Procedure 6(e) be passed on by court that impaneled grand jury and court in which collateral civil action pending).

<sup>173</sup> 239 U.S. 435 (1915).

<sup>174</sup> *Id.* at 440.

large number of cases granting nonparties access to discovery material pertinent to their litigation.<sup>175</sup> Indeed, in some products liability cases plaintiffs' attorneys have formed attorneys' information exchange groups,<sup>176</sup> at least one court has approved the sale of such information to other plaintiffs, albeit only under court supervision.<sup>177</sup> The *Manual for*

<sup>175</sup> See *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 154 (W.D. Tex. 1980) ("[N]othing [is] inherently culpable about sharing information obtained through discovery."); *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405 (N.D.N.Y. 1973); *Williams v. Johnson & Johnson*, 50 F.R.D. 31, 32 (S.D.N.Y. 1970) ("no merit to the . . . contention that the fruits of discovery in one case are to be used in that case only"); see also *C & C Prods., Inc. v. Messick*, 700 F.2d 635 (11th Cir. 1983); *Olympic Ref. Co. v. Carter*, 332 F.2d 260 (9th Cir. 1964), cert. denied, 379 U.S. 900 (1965); *Ward v. Ford Motor Co.*, 93 F.R.D. 579 (D. Colo. 1982); *Carter-Wallace, Inc. v. Hartz Mountain Indus.*, 92 F.R.D. 67 (S.D.N.Y. 1981); *United States v. Hooker Chems. & Plastic Corp.*, 90 F.R.D. 421 (W.D.N.Y. 1981). But cf. *Short v. Western Elec. Co.*, 36 FED. R. SERV. 2d (Callaghan) 132 (D.N.J. 1982) (court denies request by newspaper to unseal deposition); *Govatos v. Weis Secs., Inc.* [1982 Decisions Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,785 (S.D.N.Y. July 29, 1982) (summarizing opinion) (compelled disclosure denied where party seeking disclosure had earlier been offered opportunity to acquire information but had never attempted to reach agreement to share expert's reports before protective order was entered); *Pensfield v. Venuti*, 93 F.R.D. 364 (D. Conn. 1981) (state criminal records erasure statute does not insulate information against discovery in civil case). In *In re GAF Corp.*, No. 83-3020 (2d Cir. Apr. 27, 1983), the court of appeals directed that GAF, which was challenging the proxy materials sent out by insurgent Samuel Heyman, was entitled to access to materials under seal in connection with a Connecticut lawsuit between Mr. Heyman and his sister. The district court subsequently held that the withheld information was material and that Heyman would have to rescind it. See *Litigation Undisclosed, Rescission Ordered by Court in GAF Proxy Battle*, 15 SEC. REG. & L. REP. (BNA) No. 26, at 1260 (July 1, 1983) (reporting GAF decision).

<sup>176</sup> See *Ward v. Ford Motor Co.*, 93 F.R.D. 579 (D. Colo. 1982); see also *Kuiper v. District Court*, 632 P.2d 694, 696 (Mont. 1981) (documents from earlier unrelated products liability case were "widely disseminated"). Some plaintiffs' lawyers argue that in toxic tort cases plaintiffs should resist provisions in settlements that require confidentiality for information produced through discovery. See Lempert, *Seeds of Technology Sprout into Complex Litigation*, Legal Times, June 13, 1983, at 16, col. 1, at 30, col. 3. Moreover, plaintiffs' lawyers in these cases are beginning to organize before the litigation begins. See *Dioxin Task Force Forming; Massive Litigation Predicted*, Nat'l L.J., July 4, 1983, at 3, col. 2 (reporting that "task force" of plaintiffs' lawyers planned to gather at annual meeting of Association of American Trial Lawyers to share information and coordinate litigation). Such activity is not new. See Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116, 122 (1968) (describing meeting of plaintiffs' lawyers at ATLA meeting in 1963 to discuss coordinated strategy in products liability cases involving anti-cholesterol prescription drug MER/29).

<sup>177</sup> *In re Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig.*, 81 F.R.D. 482 (E.D. Mich. 1979), *aff'd*, 664 F.2d 114 (6th Cir. 1981). It is perilous, however, to sell such information without court approval. Thus, in *Kehm v. Procter & Gamble Mfg. Co.*, No. 80-119 (N.D. Iowa, June 29, 1982), the court held counsel for the plaintiff in a products liability action in contempt and ordered him to pay the defendant \$10,000. The plaintiff had won a \$300,000 judgment for Toxic Shock Syndrome (TSS) which was on appeal. During this period, plaintiff's attorney Riley sold the trial transcript to be an effective way to raise money. The district court found as follows in holding him in contempt:

Shortly after judgment Riley began soliciting orders from plaintiffs' lawyers in other TSS cases and sold them packets containing a transcript of the trial and all briefs, defendants' answers to interrogatories and exhibits marked by plaintiff in the final pre-trial conference order, including all exhibits covered by the protective order. . . . The original price was \$2,000.00 for both

*Complex Litigation* also endorses a flexible approach, citing the sharing of discovery, in appropriate circumstances, to avoid duplicative efforts.<sup>178</sup> The Judicial Panel of Multidistrict Litigation has even denied the transfer of related litigation on the assumption that information-sharing will occur without transfer.<sup>179</sup>

The popularity of such sharing does not mean that courts should automatically grant nonparty access. Indeed, one court held that the fact the plaintiff's counsel said she would share information, standing alone, provided good cause for entry of a protective order.<sup>180</sup> Although sharing discovery information increases efficiency, it also increases the risk that parties fearing repeated claims may fight discovery more vigorously. More generally, a rule of automatic access could undermine confidence in protective orders and result in many of the undesirable consequences described in Part II.

To date the courts have not developed a consistent accommodation of these interests. Some have suggested that when a party has relied on a protective order, the court should modify it to grant access to others only in exceptional circumstances,<sup>181</sup> but that at least one of the courts that initially adopted this approach has since repudiated it.<sup>182</sup> More workable guidelines exist. First, in order to obtain access to materials produced under a protective order in litigation number one, the party involved in litigation number two should demonstrate that he would have the right to obtain them in the second action.<sup>183</sup> Otherwise one

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packages but was later reduced to \$450.00 for the first package and \$750.00 for the transcript. The proceeds from the sale of both packages amounting to \$67,618.10 have been used for plaintiff's benefit to reduce the cost of this litigation.

Findings of Fact and Conclusions of Law, *Kehm v. Proctor & Gamble Mfg. Co.*, No. 80-119, at 3 (N.D. Iowa June 23, 1983) (on file with *Cornell Law Review*).

<sup>178</sup> *MANUAL FOR COMPLEX LITIGATION*, pt. I, § 3.11, pt. II, § 3.11 (5th ed. 1982).

<sup>179</sup> See *In re Chiropractic Antitrust Litig.*, 483 F. Supp. 811, 813 (J.P.M.D.L. 1980). When the district court in which the earlier action was pending refused to modify its protective order, the Seventh Circuit vacated and remanded, putting the burden on the parties opposing modification to establish that the materials sought would be immune to discovery in the later action. See *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1301 (7th Cir. 1980).

<sup>180</sup> *Milsen Co. v. Southland Corp.*, 1972 Trade Cas. (CCH) ¶ 73,865 (N.D. Ill. 1972).

<sup>181</sup> See, e.g., *Federal Deposit Ins. Corp. v. Ernst & Ernst*, 677 F.2d 230, 232 (2d Cir. 1982); *AT&T v. Grady*, 594 F.2d 594, 597 (7th Cir.), cert. denied, 440 U.S. 971 (1979); cf. *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 954-55 (8th Cir.) (granting writ of mandamus to overturn trial court's decision modifying protective order where there had been no "showing that intervening circumstances had in any way obviated the potential prejudice to [plaintiff]"), cert. denied, 441 U.S. 907 (1979); *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 297 (2d Cir. 1979) (Medina, J., concurring) (arguing that an agreement not to disclose discovery information "should be honored without doing any balancing as to the benefits to be derived from disregarding it").

<sup>182</sup> In *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1300 (7th Cir. 1980), the court rejected the "exceptional considerations" language it had endorsed in *AT&T v. Grady*, 594 F.2d 594, 597 (7th Cir.), cert. denied, 440 U.S. 971 (1979), calling that an "unfortunate choice of words."

<sup>183</sup> This consideration was apparently a critical consideration in *Wilk v. American Medi-*

risks subverting the substantive policies justifying nondisclosure in litigation number two.<sup>184</sup> But if the party to litigation number two has a right to obtain such materials in that case, denying him access simply increases his expense. Second, a court should ordinarily deny nonparty access if all the parties to litigation number one oppose it, even though it may increase the nonparty's expenses. Finally, a court should set aside confidentiality orders entered in connection with settlements only in extraordinary circumstances. This is a form of party autonomy that is critical to the reliability of such orders; in most situations they should not be disturbed. *Ex parte Uppercu* presented such extraordinary circumstances. Rather than show that there was a generalized overlap between the lawsuits, the petitioner alleged that specified testimony during the first case by the plaintiff in the second action directly contradicted his position in the second action.<sup>185</sup> Such a showing will be rare.

Some courts have erected special barriers to access where the nonparty seeking information is the government, although the public interest in access may well be stronger in such cases. In the leading case, Judge Marvin Frankel stressed the manifold investigative powers of the government: "The government as investigator has awesome powers, not lightly to be enhanced or supplemented by implication."<sup>186</sup> Other courts have agreed.<sup>187</sup> Although the government is in a stronger investigative position than are products liability plaintiffs,<sup>188</sup> the argument

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cal Ass'n, 635 F.2d 1295 (7th Cir. 1980), where the court suggested that it would make modification almost mandatory, denying modification only where it would "tangibly prejudice substantial rights of the party opposing modification." *Id.* at 1299.

<sup>184</sup> Use of discovery material from litigation number one in litigation number two can also threaten to subvert the substantive interests involved in litigation number one. In *Sperry Rand Corp. v. Rothlein*, 288 F.2d 245 (2d Cir. 1961), the plaintiff initially sued several former employees in federal court alleging theft of trade secrets. The district court allowed the plaintiff to complete its discovery before responding to all but one of the defendants' interrogatories, subject to a protective order limiting the plaintiff's use of information derived from discovery to the litigation between the parties. Upon completing that discovery, the plaintiff filed an action in state court against its former employees and a nondiverse defendant and requested a preliminary injunction against the defendants' activities. The federal court then enjoined the plaintiff from using the fruits of federal discovery in the state court proceeding. Finding that the injunction was necessary to protect the federal scheduling order giving plaintiff priority in discovery from abuse, the Second Circuit affirmed. *See id.* at 248-49.

<sup>185</sup> *See* 239 U.S. 435, 438-40 (1915).

<sup>186</sup> *GAF Corp. v. Eastman Kodak Corp.*, 415 F. Supp. 129, 132 (S.D.N.Y. 1976).

<sup>187</sup> *See, e.g., Martindell v. International Tel. & Tel. Corp.*, (1915), 594 F.2d 291, 296 (2d Cir. 1979); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 1978-1 Trade Cas. (CCH) ¶ 61,961 (E.D. Pa. 1976) (denying International Trade Commission leave to inspect or copy documents involved in private antitrust suit on grounds that Commission had appropriate discovery powers of its own); *see also United States v. ARA Servs., Inc.*, 1978-2 Trade Cas. (CCH) ¶ 62,250 (E.D. Mo. 1978) (rejecting government's motion to discover documents produced by ARA Services in a related private civil antitrust action against ARA).

<sup>188</sup> An area of particular concern to some is the problem of waiver of fifth amendment privileges by corporate employees who testify under a protective order. The government could not, of course, force them to testify. At the same time, however, corporate parties have no fifth amendment rights, *see United States v. White*, 322 U.S. 694, 699 (1944) (privilege

proves too much. If the government actually has such awesome investigative powers that it really does not need to take advantage of the labors of others, willing though they may be, the prospect that the government may nevertheless subsequently obtain that information provides little additional incentive for the opposing party to resist discovery in litigation number one. Thus, the primary concern that granting access may encourage resistance to discovery seems unfounded. Ironically, Judge Frankel's case illustrates the point. After failing to obtain a modification of the protective order, the government used, and the court enforced, a Civil Investigative Demand to obtain the very same information.<sup>189</sup> Thus, a special rule denying the government access is inefficient as well as unjustified.

To the contrary, some cases in which the government has sought access to discovery materials obtained by others suggest that the parties involved have resisted discovery very energetically with the goal of imposing costs on governmental agencies less capable of bearing litigation expense. Probably the best example of such behavior involves American Telephone & Telegraph Company (AT&T) which defended simultaneously a private antitrust action brought by MCI Communications and a governmental proceeding. In the private litigation, MCI had, at great expense, winnowed approximately 2.5 million pertinent documents from among some 12 million produced by AT&T.<sup>190</sup> Rather than undertaking the same task, the government proposed to use MCI's effort by obtaining a copy of its computerized analysis of AT&T documents. Although MCI did not object, AT&T did and litigated the matter as far

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against self-incrimination is personal and cannot be utilized "by or on behalf of" corporation), and both corporate and individual parties are subject to sanctions such as dismissal or default for refusing to respond to discovery on fifth amendment grounds. The protective order offers a way to avoid this dilemma in litigation between private parties, but it is ineffective if the government can have the order modified. *See generally* Note, *Modification of Protective Orders: Balancing Practical Considerations and Addressing Constitutional Rights*, 14 SUFFOLK U.L. REV. 1011 (1980) (courts should permit individual defendants to assert retroactively their privilege against self-incrimination when government seeks access to protected depositions); *cf.* Heidt, *The Conjurer's Circle—The Fifth Amendment Privilege in Civil Cases*, 91 YALE L.J. 1062, 1095-99 (1982) (protective orders generally limit circulation of incriminating statements only temporarily). The real difficulty that troubles these critics, it seems, is that in civil litigation the fifth amendment right is limited to natural persons and, when invoked, can cause a court to enter sanctions against the "innocent" corporate employer. Although the benefit of added information that would otherwise be unavailable is a legitimate concern, this problem does not merit critical weight in the decision whether to permit the government access to deposition testimony given under protective order. It is merely another consideration that a court should weigh in deciding whether to grant modification.

<sup>189</sup> *See* United States v. GAF Corp., 596 F.2d 10 (2d Cir 1979). The court found it "unlikely that private litigants will hold back discovery in what are already serious treble damage suits merely because of an additional threat of a CID directed to an adversary for discovery by the Antitrust Division." *Id.* at 15.

<sup>190</sup> *See* United States v. AT&T, 461 F. Supp. 1314, 1338-39, 1339 n.75 (D.D.C. 1978). In United States v. GAF Corp., 596 F.2d 10 (2d Cir. 1979), it was reported that the process of analyzing Kodak's documents had cost GAF \$2 million. *Id.* at 17 (Mulligan, J., dissenting).

as the Supreme Court only to be denied certiorari.<sup>191</sup> In view of the reported expense of AT&T's defense against the government's suit,<sup>192</sup> it seems specious to argue that its efforts will be redoubled unless the government is unable to profit from MCI's discovery. Indeed, as the National Commission for the Review of the Antitrust Laws concluded: "Potential defendants have no legitimate interest in wasting the government's time and taxpayers' money in the interest of gamesmanship . . . except upon a judicial determination that it would be grossly unfair or unjust to do otherwise."<sup>193</sup>

In sum, the cases that actually decide the question of nonparty access to protected discovery materials almost universally deny such access unless intended to garner information for use in other litigation.<sup>194</sup> Even where the nonparty wants to use the information in litigation, the courts are evolving rules that protect those who rely on protective orders. Although the ultimate outcome of this development is unclear, it shows that the courts realistically assess the needs of the discovery system, rather than the theoretical advantages of public disclosure, in modifying protective orders.

## 2. *Discovery Materials Involved in Pretrial Rulings*

Although few cases actually go to trial, pretrial rulings in many cases involve materials obtained through discovery, sometimes including materials covered by a protective order. Maintaining the confidentiality of such materials may be inappropriate after they are the subject of a judicial ruling. Ordinarily, discovery materials subject to judicial ruling would become part of the public record. If the discovery materials are filed under seal, however, the public may not have access to them. As the Supreme Court recently stated: "The operations of the courts and

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<sup>191</sup> AT&T v. Grady, 594 F.2d 594 (7th Cir.), cert. denied, 440 U.S. 971 (1979).

<sup>192</sup> Even before the trial began, AT&T reportedly had spent \$250 million defending the antitrust action brought by the government. See *Long Lines Drawn as Curtain Rings Up*, Nat'l L.J., Feb. 2, 1981, at 13, col. 1.

<sup>193</sup> *Report of the National Commission for the Review of Antitrust Laws and Procedures*, 80 F.R.D. 509, 551 (1979). For a more general argument favoring sharing of discovered information, see Sherman & Kinnard, *Federal Court Discovery in the 80's—Making the Rules Work*, 95 F.R.D. 245, 284-91 (1983). For arguments that federal agencies should be granted access to grand jury materials to reduce their burden of gathering information, see Note, *Federal Agency Access to Grand Jury Transcripts Under Rule 6(e)*, 80 MICH. L. REV. 1665 (1982); Note, *Facilitating Administrative Agency Access to Grand Jury Material*, 91 YALE L.J. 1614 (1982). The courts appear to be responding to such concerns. See, e.g., *United States v. Davis*, 702 F.2d 418 (2d Cir. 1983) (upholding grand jury subpoena for materials held under protective order).

<sup>194</sup> See, e.g., *Federal Deposit Ins. Corp. v. Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982); *United States v. United Fruit Co.*, 410 F.2d 553 (5th Cir. 1969), cert. denied, 396 U.S. 820 (1970); *Times News Ltd. v. McDonnell Douglas Corp.*, 387 F. Supp. 189 (C.D. Cal. 1974); cf. *Standard & Poor's Corp. v. Commodity Exch., Inc.*, 541 F. Supp. 1273 (S.D.N.Y. 1982) (refusing newspaper access to sealed portion of trial transcript). For a discussion of those extraordinary cases that justify public access, see *infra* Part III (c)(3).

the judicial conduct of judges are matters of utmost public concern."<sup>195</sup> To evaluate a judicial ruling, the public may need access to the sealed materials on which it is based. Thus, there are rights independent of the public interest in the substance of discovery materials themselves that come into play when a judge enters an order based on them. The question is whether this interest warrants public access.

To some extent, every judicial decision is of interest to the public because it is part of the mosaic of judicial resolution. As a test for access to otherwise confidential materials, this perspective is obviously too broad. Because a court is not obliged to hold pretrial hearings in open court,<sup>196</sup> the public does not necessarily have access to the decisionmaking process. More significantly, granting the public access to all materials upon which orders are based could undermine very significant interests. To take an extreme case, when a party moves to compel production of documents allegedly protected by the attorney-client privilege, the court may review the documents in camera to determine whether the privilege applies. If after that review the court denies the motion on the basis that the privilege applies, it would be difficult to evaluate the judge's performance without seeing the documents. Indeed, to permit an appellate court to review the judge's performance, the documents presumably must become part of the record.<sup>197</sup> Granting the public access, however, would undermine the privilege.<sup>198</sup> Thus, the public's interest is outweighed by other interests.

At the opposite extreme, final decisions on the merits of a case are peculiarly imbued with public interest. Thus, when a court actually relies on certain documents as grounds for granting a motion for summary judgment, as in *Zenith*, the documents attain such significance that public access is presumed.<sup>199</sup> In the same vein, the Second Circuit recently indicated that when a derivative action is dismissed on the basis of the

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<sup>195</sup> *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978).

<sup>196</sup> *See supra* notes 155-58 and accompanying text.

<sup>197</sup> *Cf.* FED. R. EVID. 612 (providing that when portion of document used by witness to refresh recollection is withheld over objections after examination in camera, it "shall be preserved and made available to the appellate court in the event of an appeal"). In the same vein, where a court reviews documents in camera to determine if they are covered by an exemption to the Freedom of Information Act, 5 U.S.C. § 552 (1982), the reviewing court must have access to the documents also. *See, e.g., Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) ("An appellate court . . . must conduct its own investigation into the document.").

<sup>198</sup> *See United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980), where the court denied access to materials that were the subject of a motion to suppress on the ground that they were illegally seized. The court noted that "it would be ironic indeed if one who contests the lawfulness of a search and seizure were always required to acquiesce in a substantial invasion of those interests simply to vindicate them." *Id.* at 321 (footnote omitted); *cf. Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458 (10th Cir. 1980) (court places briefs discussing privileged materials under seal).

<sup>199</sup> *See Cianci v. New Times Publishing Co.*, 88 F.R.D. 562 (S.D.N.Y. 1980) (summary judgment); *cf. Lec Tec Corp. v. Johnson & Johnson*, 1982-2 Trade Cas. (CCH) ¶ 64,942 (D.



decision of a special litigation committee of the board of directors, the public should have access to the materials relied on in making that decision.<sup>200</sup>

Between these two extremes it is more difficult to determine whether public access is justified. Cases in which courts have denied access to the documents used in deciding motions for preliminary injunctions<sup>201</sup> demonstrate that a determination on the merits is not the dispositive factor. In *Zenith*, Judge Becker adopted an ad hoc balancing test to determine which materials to disclose because of their impact on the summary judgment proceedings. He held that the public interest applied to all materials offered in evidence in good faith—even those ruled inadmissible by the court—on the ground that the public has an interest in evidentiary rulings, “especially in situations where, as here, [the] evidentiary rulings are critical to the ultimate disposition of the case.”<sup>202</sup> He also found that the public had an interest in materials referred to in good faith during the hearing of the motion. After examining the interests against disclosure,<sup>203</sup> he granted access to all materials prepared by the parties and submitted in connection with the summary judgment motion,<sup>204</sup> but refused to allow disclosure of certain economic data and discovery materials filed under seal.

Judge Becker’s approach in *Zenith* is troubling. His emphasis on the public interest in evidentiary rulings comes dangerously close to the extreme example of a motion to compel disclosure of privileged materials suggested above. It is unclear whether the good faith limitation can effectively limit efforts to inject confidential but irrelevant materials into judicial proceedings. In the context of a successful motion for summary judgment, however, an expansive view may be appropriate, particularly where, as in *Zenith*, “evidentiary rulings are critical to the ultimate disposition of the case.”<sup>205</sup> More generally, the dividing line is in the process of evolution.<sup>206</sup> Even with respect to motions for summary

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Minn. 1982) (court found public interest in documents on which punitive damages verdict was based exceeded interests in confidentiality).

<sup>200</sup> *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982), cert. denied, 103 S. Ct. 1498 (1983).

<sup>201</sup> See *Standard & Poor's Corp. v. Commodity Exch., Inc.*, 541 F. Supp. 1273, 1277-78 (S.D.N.Y. 1982); *Ronson Corp. v. Liquifin Aktiengesellschaft*, 370 F. Supp. 597, 600-01 (D.N.J.), *aff'd*, 497 F.2d 394 (3d Cir.), cert. denied, 419 U.S. 870 (1974).

<sup>202</sup> 529 F. Supp. at 899; *accord* *United States v. Hubbard*, 650 F.2d 293, 299 n.11 (D.C. Cir. 1980).

<sup>203</sup> See 529 F. Supp. at 901-05 (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978)). For a discussion of *Nixon v. Warner Communications*, see *supra* notes 134-36 and accompanying text. The showing needed to justify denying access to such materials would have to be stronger than the showing needed to provide good cause for a protective order because the public interest in materials involved in judicial decisions is much greater than the corresponding interest in routine discovery materials.

<sup>204</sup> 529 F. Supp. at 905-08.

<sup>205</sup> *Id.* at 899.

<sup>206</sup> Particularly difficult problems may arise in class actions because of a court’s substan-

judgment, however, there may be substantial reasons to deny access to these materials when the court denies the motion. The requisite legal determination for denial of a motion for summary judgment—the existence of a genuine dispute as to a material fact—provides little insight into the decision on the merits. Rather, such a decision is properly characterized as a refusal to decide the merits. Given the frequency and ease with which parties move for summary judgment, oftentimes as a pretext for public dissemination of discovery materials, a good faith rule provides inadequate protection. Moreover, a ruling that a party must disclose to the public all materials offered in connection with a motion for summary judgment that is ultimately denied could preclude later settlement conditioned on confidentiality.

Accordingly, the better course is to limit this ground for public access to materials forming the basis for the decision on the merits. The critical point is that public access is justified by the special interest in overseeing judicial action and not by the general public interest in the discovery materials themselves. Regardless of the future contours of this ground for access, the fact that some interest other than the mere production of materials through the discovery process serves as the justification for disclosure belies a generalized right of nonparties to obtain access to the fruits of discovery.

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tial duty to supervise these lawsuits. The Supreme Court has recently intimated that the first amendment circumscribes a court's power to limit communications with class members. *See* *Gulf Oil Corp. v. Gilbert*, 452 U.S. 89 (1981). The Fifth Circuit's decision in the case, which the Court affirmed, had treated these orders as prior restraints. *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 466-78 (5th Cir. 1980). The Supreme Court did not, however, resolve the case on constitutional grounds. *See* 452 U.S. at 101-02. Thus, there are first amendment limits on the exercise of a court's power.

In exercising the power to supervise class actions, courts make decisions that implicate public interests, thereby creating a basis for public access. Particularly difficult problems may result from a court's duty under rule 23(e) to approve any settlement of a class action. To do so, a court must conclude that the settlement is "fair, reasonable and adequate," *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 217 (5th Cir. 1981), a process that requires some assessment of the evidence unearthed by the parties. If that material is covered by a protective order, the court's process of assessment may provide a basis for vacating the order. Yet disclosure might preclude a settlement contingent on confidentiality. In addition, the court must give the class members notice to allow them to decide whether to object to the settlement; the class members are entitled to pursue discovery regarding the merits of the settlement. *Cf.* *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 464 (2d Cir. 1974) (limiting discovery available to objecting class members in light of available data). In view of the extent of disclosure and judicial evaluation of the merits, it is questionable whether class actions can often be settled on a confidential basis. For an example of the difficulty of maintaining confidentiality in the class action settlement context, see *Rodgers v. United States Steel Corp.*, 536 F.2d 1001 (3d Cir. 1976). In the *Corrugated Container* cases, the Fifth Circuit eventually upheld the trial court's reliance on sealed materials in approving the class settlement on the ground that the publicly articulated findings gave sufficient notice of the basis for the court's action. *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1322, 1326-27 (5th Cir. 1981), *cert. denied*, 456 U.S. 1012 (1982).

### 3. *Public Interest in Governmental Acts*

There are rare cases in which alleged governmental misconduct justifies access. *Halkin* was one such case. The court there observed that the discovered information about CIA activities "lies near the heart of . . . the first amendment."<sup>207</sup> In another recent protective order case, the court described the governmental behavior as "one of the most controversial and well-publicized events in recent Puerto Rico history."<sup>208</sup> Similarly, the Sixth Circuit recently upheld a trial court's order vacating its longstanding protective order covering the discovery materials developed in civil actions arising from the shooting deaths of students during the May 1970 demonstrations on the campus of Kent State University.<sup>209</sup> In these cases, it is the substance of the discovered information, rather than its role in judicial decisionmaking, that is critical.

These cases prompt two significant observations. First, they are very rare. The Supreme Court's right of access cases involving prison conditions<sup>210</sup> demonstrate that the fact that information is sought about governmental activity does not ensure automatic public access. Indeed, in one case involving prison conditions the Court appeared to view a protective order as a useful tool.<sup>211</sup> Even a case involving matters of historical importance does not automatically merit publicity. For example, in deciding whether to enter a protective order covering a settlement agreement reached by the Federal Deposit Insurance Corporation in an action against certain accountants involved in the failure of Franklin National Bank, the court considered the "historical importance of the FNB failure," but decided that avoiding a six-month trial nevertheless justified entry of a confidentiality order.<sup>212</sup> When disclosure is appropriate, moreover, a court should strive to preserve confidences that

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<sup>207</sup> 598 F.2d at 188.

<sup>208</sup> *In re San Juan Star Co.*, 662 F.2d 108, 110-11 (1st Cir. 1981).

<sup>209</sup> *Krause v. Rhodes*, 671 F.2d 212 (6th Cir.), *cert. denied*, 103 S. Ct. 54 (1982). Another recent example is *McSurely v. McAdams*, 502 F. Supp. 52 (D.D.C. 1980), in which former antipoverty workers asserted that a United States Senator and various congressional officials had violated their constitutional rights by allegedly arranging a raid on the plaintiffs' house as part of a pattern of harassment. See *Civil Damage Suit Won By M'Surleys*, N.Y. Times, Jan. 8, 1983, at 9, col. 1 (city ed.). Even in this case, the court entered a protective order. See *McSurely v. McAdams*, 1982-1 U.S. Tax Cas. (CCH) ¶ 9158 (D.D.C. 1982); see also *ACLU v. Finch*, 638 F.2d 1336, 1345 (5th Cir. 1981) (in suit alleging illegal surveillance by Mississippi Sovereignty Commission, court held that although Mississippi Legislature could not seal files of Commission against discovery to allow "old wounds to heal," court could issue an appropriate protective order to accommodate defendants' interests); *United States v. Dorfman*, 550 F. Supp. 877, 879 (N.D. Ill. 1982) (court granted public access to materials received in pretrial suppression hearing, noting that charges included attempt to bribe United States Senator and case involved "the most pervasive wiretap in the history of the federal wiretap statute").

<sup>210</sup> See *supra* notes 142-47 and accompanying text.

<sup>211</sup> See *supra* note 148.

<sup>212</sup> See *In re Franklin Nat'l Bank Secs. Litig.*, 92 F.R.D. 468, 472 (E.D.N.Y. 1981), *aff'd sub nom.* *Federal Deposit Ins. Corp. v. Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982).

need not be revealed. Thus, in the Kent State cases, the trial court kept *all* discovery material sealed until the cases were settled in an attempt to promote settlement. After settlement, the court ordered the redaction of all material that would invade privacy before vacating its protective order.<sup>213</sup> Even when governmental activity is involved, then, general public access to confidential materials will only rarely be appropriate. The mere presence of the government as one of the litigants should not be controlling in most cases.<sup>214</sup>

Second, this public interest exception applies only to governmental activity; it does not apply to purely private activity that has generated great public interest. This conclusion follows from the observation in *Nixon v. Warner Communications* that courts may deny access to matters in the public record after trial in divorce cases and other cases involving purely private interests.<sup>215</sup> Problems are likely to arise, however, in situations in which private litigants are dealing with matters that involve a substantial public interest. One commentator has argued, for example, that there is a substantial public interest in the actions of large private enterprises.<sup>216</sup> Furthermore, it is easy in our highly regulated society to hypothesize a governmental role, even if only by emphasizing government inaction. For example, the Seventh Circuit used the following hypothetical to justify its decision to overturn a local rule gagging attorneys: "[I]n an airplane crash case an attorney who discovered that unsafe flight procedures were in effect and were being condoned by governmental regulatory agencies could not impart this vital knowledge to the public . . . ."<sup>217</sup> Part IV of this article addresses the difficult problems presented by the rights of the litigants and their attorneys to discuss the case. This Part addresses only the public's right of access.

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<sup>213</sup> *Krause v. Rhodes*, 671 F.2d 212, 217 (6th Cir.), *cert. denied*, 103 S. Ct. 54 (1982). For examples of similar redaction of taped evidence before release to the press, see *In re National Broadcasting Co.*, 653 F.2d 609, 620 (D.C. Cir. 1981); *United States v. Criden*, 648 F.2d 814, 829 (3d Cir. 1981).

<sup>214</sup> Brief reflection on the number of mundane cases in which the government is a party should suffice to demonstrate that, in most such cases, there is no significant public interest. Consider, for example, all the simple tort claims brought under the Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 842 (codified as amended in scattered sections of 28 U.S.C.). Rarely will a collision with a mail truck involve issues analogous to CIA surveillance of civilians. Furthermore, other cases in which the government is a party might involve archetypal trade secret information. Consider, for example, a suit by NASA alleging that a supplier had provided a defective part for the space shuttle where the design of the part became an important issue. As in this example, the bulk of the lawsuits in which the government is a party involve private disputes where one party merely happens to be the government. These suits hardly invoke the public interest to the same degree as did *Halkin*.

<sup>215</sup> See *supra* notes 135-36 and accompanying text.

<sup>216</sup> See Note, *Rule 26(c) Protective Orders and the First Amendment*, 80 COLUM. L. REV. 1645, 1656 (1980) (equating information about government with information about large private corporations).

<sup>217</sup> *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 258 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

With respect to the public right of access, the hypothetical government noninvolvement is insufficient to justify access in the airplane crash case just as it is insufficient in a divorce case, although there may be an actual public interest in both.

In so concluding one must acknowledge that the public interest may appear strong in some situations. Appropriately, an actual airplane crash case provides a good example. In 1974, a DC-10 crashed near Paris, killing all 350 persons on board. The crash spawned a multitude of wrongful death lawsuits in this country, all of which were ultimately consolidated before Judge Pierson Hall, who ordered all depositions sealed. The publisher of the *London Times* sought a declaratory judgment establishing its right to send a reporter to the depositions. Noting that depositions are not part of the trial, Judge Hall rejected *The Times's* arguments and dismissed the action.<sup>218</sup> Meanwhile, the discovery process uncovered documents indicating that the manufacturer may have known of the alleged design defect that caused the disaster before the plane went into production. After this disclosure, the manufacturer stipulated to liability on the condition that all discovery remain confidential and Judge Hall so ordered.<sup>219</sup> Thus, the evidence relating to the alleged design defect was never publicly examined or discussed.

The result is troubling from the perspective of other potential passengers on DC-10s. There has, after all, been another DC-10 disaster since.<sup>220</sup> Should the judge have insisted on some change in design or a warning to the airlines as a condition for continued confidentiality? The answer ultimately depends on the assumption that lawsuits are designed to resolve private claims, not to generate information for public consumption. Surely it would be odd to force the parties to proceed with litigation by denying them the confidentiality they had agreed upon as a condition for settlement. The information involved would not have been revealed but for the initiative of the plaintiffs, and was provided to them only for use in connection with their litigation. Once that objective was accomplished, the information should not become an impediment to resolving the case.

In sum, there are reasons for limiting the public interest notion to a

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<sup>218</sup> *Times Newspapers Ltd. v. McDonnell Douglas Corp.*, 387 F. Supp. 189 (C.D. Cal. 1974); accord *In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 582, 584 (E.D.N.Y. 1983) (holding that CBS does not have standing to challenge protective order to which parties did not object). In the *Agent Orange* litigation, the court later decided, however, to allow disclosure of certain materials covered by the protective order. See *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 539 (E.D.N.Y. 1983).

<sup>219</sup> This description of the negotiation of stipulation to liability is based on a presentation by Professor Andreas Lowenfeld of New York University Law School at the program of the Civil Procedure Section of the American Association of Law Schools in Philadelphia, Pa., on January 7, 1982. See 1982 Meeting of the Association of American Law Schools, Cassette No. 44B (1982).

<sup>220</sup> See *In re Air Crash Disaster Near Chicago, Ill.*, on May 25, 1979, 90 F.R.D. 613 (N.D. Ill. 1981).

narrow group of cases involving governmental actions in which there is a substantial public interest. Most cases do not, however, fall into this category. Thus, general dissemination of discovered information is the exception rather than the rule.

#### IV

#### REASSESSING THE FIRST AMENDMENT RIGHTS OF LITIGANTS

The more difficult task of properly assessing the first amendment rights of the litigants and lawyers remains. Unlike the public at large or other parties involved in related litigation, these people receive information generated through discovery whether or not it is covered by a protective order. Here again, however, one confronts the myths underlying the *Halkin* analysis. Beyond assuming that discovery information is a part of a public process, Judge Bazelon predicated his analysis of the rights of litigants on the conclusion that the Federal Rules of Civil Procedure generally contemplate free disclosure of discovered information. Part I of this article demonstrated that lawyers and judges actually assume the contrary. This Part argues that *Halkin's* premise is also contrary to established precedent about the proper purposes of discovery. Courts should reject this premise as well as the myth that discovery is public and recognize that substantial restrictions on the dissemination of confidential information obtained through discovery are warranted to guard against undermining the civil discovery system.

##### A. Proper Purposes for Discovery and Unfettered Use of Discovered Information

*Halkin* assumes that the Federal Rules allow any use of discovered information in the absence of a protective order. Pushed to its logical conclusion, the *Halkin* approach establishes civil litigation as an alternative to the Freedom of Information Act<sup>221</sup> for obtaining information.<sup>222</sup> What Justice Stewart maintains the Constitution does not do,<sup>223</sup> *Halkin* finds in the interstices of the Federal Rules.

It is astonishing in this era of litigation boom and discovery crisis to suggest that information-gathering is a legitimate purpose for litigation. The more sensible response is reflected in a number of pleading cases, in which the courts have denied plaintiffs access to discovery even for the

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<sup>221</sup> 5 U.S.C. § 552 (1982).

<sup>222</sup> See *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 258 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). In *Halkin*, for example, it appears that the materials at the heart of the controversy could have been obtained under the Freedom of Information Act. See 598 F.2d at 207 n.30 (Wilkey, J., dissenting); cf. *Energy Conservation, Inc. v. Heliodyne, Inc.*, 1982-83 Trade Cas. (CCH) ¶ 65,179 (9th Cir. 1983) (upholding antitrust claim alleging defendants brought lawsuit solely to generate publicity adverse to competitor).

<sup>223</sup> See *supra* text accompanying note 171.

purpose of developing evidence for use at trial unless they already have sufficient evidence to satisfy the court that there is a good basis for the suit. In applying rule 9(b)'s requirement of particularity in pleading of fraud, for example, many courts reject plaintiffs' contentions that they need discovery to provide the specifics. As the Second Circuit observed in a leading case, "[a] complaint alleging fraud should be filed only after a wrong is reasonably believed to have occurred; it should serve to seek redress for a wrong, not to find one."<sup>224</sup> Courts have applied similar reasoning in civil rights suits and other actions.<sup>225</sup> Although one may criticize these decisions for denying plaintiffs the very tools the Federal Rules provide to enable them to prove their claims,<sup>226</sup> they stand in stark contrast to the cases suggesting that parties may initiate litigation and discovery to obtain information—to find a wrong and report on it—rather than to obtain judicial relief.

Not surprisingly, the freewheeling view of the discovery provisions of the Federal Rules adopted in *Halkin* and similar cases has scant legal support. The basic reasoning of these courts is that because the rules provide for specific limitations on disclosure only upon a showing of good cause, courts and the parties must assume that information obtained through discovery can otherwise be put to any use.<sup>227</sup> This view is contrary to the assumption made by litigators and most trial courts that discovery is inherently intended only for use in connection with the

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<sup>224</sup> *Segal v. Gordon*, 467 F.2d 602, 607-08 (2d Cir. 1972); *accord* *Lincoln Nat'l Bank v. Lampe*, 414 F. Supp. 1270, 1279 (N.D. Ill. 1976).

Most of these cases were suits under SEC rule 10b-5, 17 C.F.R. § 224.10b-5 (1983), which is the general securities antifraud rule. The approach taken by these courts is arguably inconsistent with *Herman & MacLean v. Huddleston*, 103 S. Ct. 683 (1983), in which the Court declined to impose the traditional common law fraud requirement of proof by clear and convincing evidence in rule 10b-5 cases. It reasoned that "[t]he interests of defendants in a securities case do not differ qualitatively from the interests of defendants sued for violations of other federal statutes such as the antitrust or civil rights laws, for which proof by a preponderance of the evidence suffices." *Id.* at 692. If a higher proof requirement is not appropriate, a higher pleading standard also seems questionable.

<sup>225</sup> *See, e.g.*, *United States v. City of Philadelphia*, 644 F.2d 187, 204-06 (3d Cir. 1980); *Albany Welfare Rights Org. Day Care Center v. Schreck*, 463 F.2d 620, 623 (2d Cir. 1973); *see also* *Franchise Realty Interstate Corp. v. San Francisco Joint Exec. Bd. of Culinary Workers*, 542 F.2d 1076, 1082-83 (9th Cir. 1976) (first amendment defense in antitrust action), *cert. denied*, 430 U.S. 940 (1977); *Heart Disease Research Found. v. General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972) (antitrust suit).

<sup>226</sup> These decisions are subject to criticism on the ground that they overreact to problems with the abuse of discovery in particular and abuse of litigation in general. The central difficulty in many of these decisions is that even though discovery appears to be the only way in which the plaintiffs can substantiate their charges, it is denied to them. The point is not that these cases are right, but that it is illogical to promote litigation principally designed to obtain information and, simultaneously, to deny discovery principally designed to prove the plaintiff's case.

<sup>227</sup> *See, e.g.*, *Halkin*, 598 F.2d at 188; *AT&T v. Grady*, 594 F.2d 594, 596 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979); 4 J. MOORE & J. LUCAS, *supra* note 156, ¶ 26.75, at n.3 (2d ed. Supp. 1982-83) (citing *Davis v. Romney*, 55 F.R.D. 337 (E.D. Pa. 1972)).

litigation.<sup>228</sup> It also renders the risk of public disclosure irrelevant to the decision whether to order production.<sup>229</sup> The existence of a good cause requirement for entry of an affirmative protective order does not, by reverse reasoning, justify rejecting the existing expectations of litigants and courts. In fact, cases discussing the proper purposes for discovery directly contradict this argument.

In addition to relying on the absence of specific limitations on the use of discovery materials, the *Halkin* majority, like several other courts,<sup>230</sup> relied on a 1955 district court decision<sup>231</sup> for the proposition that a party who obtains information through discovery can "use that information in any way which the law permits."<sup>232</sup> In reality, the 1955 ruling is much more narrow and actually suggests a contrary conclusion. The defendants there were being sued, or feared a second suit, on matters they perceived to be related to the issues in the present litigation. They contended, therefore, that a protective order was necessary to prevent the plaintiff's counsel from turning discovered information over to the defendants' other adversaries.<sup>233</sup> In response, the plaintiff's attorney submitted an affidavit disavowing any intention of divulging information obtained through discovery to the other attorneys. In addition, he asserted that "with respect to general information that comes to him here and is relevant to another action he should be able to use that information in any way which the law permits."<sup>234</sup> The court, finding that the defendants' motion was based on "an imputation of bad faith to plaintiff or its counsel," denied the motion due to "the absence of anything to make me doubt the attorney's good faith."<sup>235</sup> When viewed in its proper context, therefore, this case hardly stands for the broad proposition for which *Halkin* and others have cited it. Indeed, the re-

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<sup>228</sup> See *Rhinehart v. Seattle Times*, 98 Wash. 2d 226, 235, 654 P.2d 673, 679 (1982), *cert. granted*, 52 U.S.L.W. 3261 (U.S. Oct. 4, 1983) (No. 82-1721).

Nowhere in the history of the rules or in the commentaries which we have read upon them can we find any indication that the purposes included that of disseminating to the general public the information derived from discovery, or any suggestion that such dissemination would serve the ends sought to be achieved by the rule.

<sup>229</sup> See *supra* notes 86-87 and accompanying text for a discussion of cases suggesting that the risk of disclosure is relevant.

<sup>230</sup> See, e.g., *National Polymer Prods., Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 423 (6th Cir. 1981); *Essex Wire Corp. v. Eastern Elec. Sales Co.*, 48 F.R.D. 308, 312 (E.D. Pa. 1969); *Wilson v. Piper Aircraft Corp.*, 46 Or. App. 795, 799, 613 P.2d 104, 106 (1980); *Rhinehart v. Seattle Times*, 98 Wash. 2d 226, 264, 654 P.2d 673, 694 (1982) (Utter, J., dissenting) *cert. granted*, 52 U.S.L.W. 3261 (U.S. Oct. 4, 1983) (No. 82-1721).

<sup>231</sup> *Leonia Amusement Corp. v. Loew's, Inc.*, 18 F.R.D. 503 (S.D.N.Y. 1955).

<sup>232</sup> *Halkin*, 598 F.2d at 188 (quoting *Leonia Amusement Corp. v. Loew's, Inc.*, 18 F.R.D. 503, 508 (S.D.N.Y. 1955)).

<sup>233</sup> 18 F.R.D. at 508.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*



peated emphasis of a good faith intention not to use discovered information for collateral purposes undermines *Halkin's* reasoning.

Contrary to *Halkin's* assumption, courts often assert that using discovery for any purpose other than preparation for trial in the action in which the discovery is sought is bad faith that justifies denial of discovery. The issue usually arises in a situation in which the party seeking discovery actually intends to use the information in another litigation. As the Supreme Court observed in a recent case, "when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery properly is denied."<sup>236</sup> The rationale behind this rule is that if there is a ground for denial of disclosure in the other proceeding, it would be subverted if disclosure of the same information could be compelled in the first proceeding. Courts reason, for example, that it is improper to use civil discovery to obtain material that cannot be obtained in a criminal proceeding.<sup>237</sup> Cases limiting discovery where the collateral purpose is not to use information in ancillary litigation are rarer but not unknown.<sup>238</sup> For example, in *Galella v. Onassis*,<sup>239</sup> the celebrated false arrest action by photographer Ron Galella against Jacqueline Onassis, the court excluded Galella from Onassis's deposition to prevent him from photographing her during the deposition.<sup>240</sup> Thus, the courts are also sensitive to misuse of the discovery system when, as in Galella's case, a party uses it to produce grist for the media's mill.<sup>241</sup> Obviously, the point is not to encourage scrutiny of the purpose of the party seeking discovery,<sup>242</sup> but the fact that it has any

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<sup>236</sup> *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 n.17 (1978); *accord* *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1300 (7th Cir. 1980).

<sup>237</sup> *See* *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963); *cf.* *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 683-84 (1958) (dictum) (improper to use grand jury to obtain information for use in civil proceedings).

<sup>238</sup> There are also cases in which the forbidden purpose is used in ancillary civil litigation. *See, e.g.*, *Beard v. New York Cent. Ry.*, 20 F.R.D. 607, 610 (N.D. Ohio 1957).

<sup>239</sup> 487 F.2d 986 (2d Cir. 1973).

<sup>240</sup> *Id.* at 997; *see also* *Air Tec Assoc., Inc. v. Cottman Transmission Systems*, 1980-2 Trade Cas. (CCH) ¶ 63,560 (E.D. Pa. 1980) (protective order limiting disclosure of commercial information because of fear that plaintiff would use information to harm defendant's relations with other franchisees); *Harlem River Consumers Coop., Inc. v. Associated Grocers, Inc.*, 54 F.R.D. 551 (S.D.N.Y. 1972) (photographs taken during discovery proceedings not to be used for any purpose); *cf.* *Bridge C.A.T. Scan Assocs. v. Technicare Corp.*, 710 F.2d 940, 944-46 (2d Cir. 1983) (court has no inherent power to restrict litigant's use of information not obtained through discovery).

<sup>241</sup> The trial court also granted Onassis relief on her counterclaims for intentional infliction of emotional distress. *See* 353 F. Supp. 196, 231, 241 (S.D.N.Y. 1972). Galella claimed that his photographic activities were newsgathering and therefore immune from potential tort liability because they were protected activity under the first amendment. The Second Circuit rejected this argument. *See* 487 F.2d at 995-96; *see also supra* note 90 (quoting *Soto v. Romero Barcelo*, 559 F. Supp. 739, 741 (D.P.R. 1983)).

<sup>242</sup> It takes little imagination to envision the potential for collateral litigation if courts regularly scrutinize the "true" purpose for discovery. Thus, while recognizing that a bad purpose is potentially relevant, courts normally impose on the party making such an assertion

significance undercuts *Halkin's* conclusion.

If the Federal Rules contemplated free use of discovered information for collateral purposes, the intention to make such use of relevant information would not justify denying discovery. Thus, *Halkin's* assumption that the Federal Rules intended free dissemination of such information cannot be reconciled with the above cases. The policy reasons that justify denial of discovery apply equally to limiting dissemination of information after it is produced through discovery. Any other rule would deter cooperation and needlessly increase the intrusiveness of discovery. Moreover, free dissemination threatens to subvert other values in the same way that using discovery for collateral purposes does. As in *Galella v. Onassis*, free dissemination can cause an invasion of privacy that is unnecessary to the litigation process, and it may threaten the integrity of the litigation process itself.<sup>243</sup> Balanced against these interests, the speculative possibility that in some cases the public would benefit from dissemination of information garnered through discovery hardly warrants the conversion of the process into an investigatory tool for inquisitive litigants. Rather, courts should continue to affirm the widely accepted premise of confidentiality.

Although information obtained through discovery is intended solely for use in the related litigation, disclosure of such information outside the litigation process is not contempt of court. To justify entry of a protective order, one must show good cause. One court has held that a counsel's statement that she intended to reveal information obtained through discovery to other plaintiffs constituted good cause justifying entry of a protective order,<sup>244</sup> but such a conclusion is not essential to undermine the *Halkin* premise. The point is that the assumption of free discloseability does not follow from the absence of explicit limitations on disclosure. This assumption therefore should not be used to limit the court's power to enter a protective order on a proper showing.

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the duty to show that discovery is sought solely for that purpose. See, e.g., *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405, 410 (N.D.N.Y. 1973); *Essex Wire Corp. v. Eastern Elec. Sales Co.*, 48 F.R.D. 308, 310 (E.D. Pa. 1969). Particularly in view of the assumption that the use of discovery information for collateral purposes is improper, such limitations on inquiry into purpose were well-founded. If the prevailing view changes and the parties are permitted to use discovery information for any purpose, the courts may well be tempted to scrutinize purposes more closely before allowing discovery. See *supra* text accompanying notes 84-88.

<sup>243</sup> See *Konrad v. DeLong*, 57 F.R.D. 123 (N.D. Ill. 1972), where the court granted a protective order to guard against intimidation of a witness by the defendant. The defendant in this medical malpractice action had used discovery to obtain the report of the plaintiff's medical expert and promptly forwarded it to the local medical association, asking that the expert be investigated for unethical behavior. The court ordered the defendant to withdraw the charges on the ground that they were made to intimidate the plaintiff's expert. *Id.* at 125.

<sup>244</sup> See *Milsen Co. v. Southland Corp.*, 1972 Trade Cas. (CCH) ¶ 73,865 (N.D. Ill. 1972).

## B. Reconciling the First Amendment with Rule 1 Interests

Rejecting the myth that the Federal Rules look with equanimity on nonlitigation use of discovered information does not solve the problems presented by litigants' first amendment rights. These problems are less troubling, however, once that myth is rejected and other realities of the judicial system are recognized. Initially, it is important to note that the trial process is highly regimented. Indeed, the Supreme Court observed recently that "[i]n the conduct of a case, a court often finds it necessary to restrict the free expression of participants, including counsel, witnesses, and jurors."<sup>245</sup> Courts may instruct attorneys and witnesses not to mention or suggest the existence of inadmissible but highly interesting information.<sup>246</sup> The court instructs the jurors, who share only the common bond of experiencing the trial, not to discuss the case with each other, or anybody else, until it is completed and they begin their deliberations. Protective orders are also a part of this scheme, representing an attempt to preserve the litigation process by limiting the freedom of parties and lawyers to reveal information they have obtained through the judicial process.

The impact of these restrictions on litigants' first amendment rights should not be taken lightly; no one would argue that they should be imposed automatically. The direct prohibition on discussing confidential material is an obvious restraint of free expression. Less obvious is the chilling effect resulting from a protective order. For example, a party who discusses his case using

nonconfidential material may nevertheless face accusations that he based his comments on information protected by the court's order.<sup>247</sup> The chilling effect can loom quite large to a party subject to a contempt order. Thus, this article does not suggest that courts automatically impose protective orders on unwilling litigants.

Nevertheless, litigants have a substantial interest in the orderly operation of the civil litigation system that can properly be accorded substantial weight in evaluating first amendment rights. Balanced against the interest in orderly litigation, most litigants' first amendment interests in free expression do not appear compelling. Because some cases involve highly significant first amendment interests, however, it is impossible to urge that courts should disregard first amendment interests

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<sup>245</sup> *Gulf Oil Corp. v. Bernard*, 452 U.S. 89, 104 n.21 (1981).

<sup>246</sup> Thus, courts regularly instruct attorneys, parties, and witnesses not to refer to matters that might be unduly inflammatory or prejudicial. *See* FED. R. EVID. 403.

<sup>247</sup> Conversely, discovery can free a party from the chilling effect of potential defamation claims because statements about the contents of court records may be absolutely privileged against defamation claims under state law. At least one court has entered a protective order prohibiting the plaintiff from revealing his own interrogatory answers to deprive him of that protection. *See* *Lucido v. Cravath, Swain & Moore*, 25 Fed. R. Serv. 2d (Callaghan) 1050 (S.D.N.Y. 1978).

altogether. The better solution is to adopt a waiver theory under which a party is deemed to waive his first amendment rights when, after a proper showing of confidentiality, a party chooses to extract information from his opponent subject to a protective order.

### 1. *The Weight Accorded Interests in Confidentiality*

Even the *Halkin* court acknowledged that "[a] smoothly operating system of liberal discovery is in the interests of litigants and society as a whole, for it contributes to a full and fair airing of all material facts in controversy."<sup>248</sup> Nevertheless, few courts have attempted to determine how much weight should attach to these efficiency concerns as compared with the weight attached to the free expression interests protected by the first amendment. Instead, in most cases, the right to a fair trial is the interest advanced to counterbalance first amendment interests. In criminal cases, the courts often find this interest compelling.<sup>249</sup> Even in criminal cases, however, the interest in free expression weighs equally heavily in some circumstances.<sup>250</sup> At first glance, the interest in the smooth operation of discovery in civil litigation hardly seems of comparable importance. Closer examination, however, shows that courts have countenanced significant limitations on expression to protect interests similar to those that motivate the entry of protective orders.

Limiting free expression to preserve the smooth operation of the judicial system does not necessarily violate the first amendment. For example, rule 6(e) of the Federal Rules of Criminal Procedure prohibits grand jurors from disclosing matters occurring before the grand jury.<sup>251</sup> It is uncontroverted that information of substantial public interest is often revealed in such proceedings, and that the grand jurors have a first amendment interest in revealing this information to the waiting media or public. In every case, however, grand jurors are forbidden to disclose this information even though no party has demonstrated any particular reasons for secrecy in the given case.<sup>252</sup> This restraint resembles a gag order and certainly is more extensive than a protective order based on a

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<sup>248</sup> 598 F.2d at 192.

<sup>249</sup> See *Sheppard v. Maxwell*, 384 U.S. 333, 349-52 (1966).

<sup>250</sup> Thus, in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 568-69 (1976), the Court acknowledged that there was a risk of impairing a fair trial. Nonetheless, the Court invalidated a gag order entered by the trial court in a criminal case on first amendment grounds.

<sup>251</sup> FED. R. CRIM. P. 6(e).

<sup>252</sup> For a dramatic illustration of a grand jury chafing at the restraints of secrecy, consider *In re Grand Jury Impaneled January, 1969*, 315 F. Supp. 662 (D. Md. 1970). The grand jury there attempted to return an indictment, but the Attorney General directed the United States Attorney not to sign it. As this contretemps developed, the *New York Times* published an account, including a purported verbatim quotation from the grand jury's presentment. See *id.* at 683. The court held that an "indictment" without the signature of the United States Attorney was ineffective to commence a prosecution, but in the public interest it decided to disclose certain information about the grand jury's efforts. See *id.* at 676-77, 679-80. With respect to the *New York Times* article, the court held that it had the power to require *The Times*

particularized showing that applies only to certain information produced through discovery. Nevertheless, the restraint on grand jurors is justified for several reasons: (1) it encourages prospective witnesses to come forward with testimony; (2) it promotes truthful testimony; (3) it avoids public ridicule of those not indicted; and (4) it protects against flight by those who are indicted.<sup>253</sup> Despite these policy considerations, courts sometimes grant interested parties access to grand jury materials.<sup>254</sup> Even so, the restraint on the grand jurors' freedom to discuss evidence presented before them is automatic, and the Supreme Court has regularly confirmed the propriety of this tradition of privacy.<sup>255</sup>

The interests furthered by protective orders, and the risks of curtailing their reliability or availability, resemble the systemic interests served by rule 6(e). Protective orders encourage full disclosure and attempt to prevent any unnecessary injury to parties and nonparties resulting from disclosure. In addition, the ready availability of protective orders avoids a glut of protective order litigation that might otherwise

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to divulge its sources. The court, however, declined to require disclosure because there was no claim that any grand juror or court personnel had made forbidden disclosures. *Id.* at 685.

Another example of grand jury activism is *In re* Petition for Disclosure of Evidence Before October, 1959, Grand Jury, 184 F. Supp. 38 (E.D. Va. 1960). In its report, the grand jury indicated the nature of its proceedings and recommended that the court turn over evidence it had acquired to the Mayor of Richmond. Finding that the request "despite its sincerity has no standing in law," *id.* at 39, the court criticized the grand jury for disclosing even the tenor of the evidence and ordered its report expunged. *Id.* at 40.

The point in these cases is that grand jurors, even when acting with the best of motives, have no right to disclose what they have learned. Only the court may decide what may be disclosed.

<sup>253</sup> See *Illinois v. Abbott & Assocs., Inc.*, 103 S. Ct. 1356, 1361 (1983) (emphasizing "General Rule of Secrecy" of grand jury proceedings); *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218-19 (1979); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 398 (1959); cf. *Goodman v. United States*, 108 F.2d 516, 520 (9th Cir. 1939) (court in rejecting first amendment argument against oath of secrecy required of grand jury witness, described witness's objection as "specious" and noted that "[i]t has never been supposed that grand jurors are deprived of the constitutional right of free speech through the oath of secrecy which they take").

<sup>254</sup> Even though interested parties may have access, the court may limit any subsequent disclosure of the grand jury materials. See *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 223 (1979) ("[I]f disclosure is ordered, the court may include protective limitations on the use of the disclosed material.").

<sup>255</sup> Thus, in *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972), the Court, while holding that a newspaper reporter has no first amendment right to refuse to answer questions before a grand jury, noted in passing that "the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations." In *Pell v. Procunier*, 417 U.S. 817 (1974), the Court relied by analogy on the *Branzburg* quotation in concluding that the press has no constitutional right of access to prisons. *Id.* at 833-34. The proponents of greater public access to prisons rejected the analogy to prisons but did not reject the premise that grand jury proceedings are closed. Certainly none of the Justices are endorsing press access to their own conferences. See B. WOODWARD & S. ARMSTRONG, *THE BROTHERS* 356 (1979) (describing address by Justice Brennan to new law clerks regarding maintaining confidentiality of Court's work).

inundate courts in many more complex cases. Similar considerations explain the automatic restrictions on disclosure by participants in other semi-judicial proceedings.<sup>256</sup> In *Landmark Communications, Inc. v. Virginia*,<sup>257</sup> for example, the Supreme Court carefully reserved decision on the constitutionality of disclosure restrictions while holding that the state could not prosecute a newspaper for publishing information about proceedings before a state judicial disciplinary commission. The commission was a public body established to consider disciplinary measures against judges, and the state had provided that its proceedings should be kept confidential.<sup>258</sup> The state maintained that keeping the proceedings confidential encouraged the filing of complaints and the willing participation of witnesses, protected judges from the publicity of unjustified complaints, and made resignation to avoid disciplinary proceedings a viable method of resolving potential disputes.<sup>259</sup> The Court assumed that these were legitimate state interests<sup>260</sup> and did not question the state's power to keep the proceedings confidential or to punish participants, including witnesses,<sup>261</sup> for disclosure. Thus, even though the deliberations of a public body regarding judicial performance were at issue, the Court was careful to preserve the state's power to impose a confidentiality requirement on the participants, including witnesses, and to use contempt sanctions to enforce such limitations.<sup>262</sup>

*Landmark Communications* indicates that courts should not lightly disregard potential disruption of orderly quasi-judicial proceedings in favor

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<sup>256</sup> For example, federal bankruptcy judges may exercise their discretion and restrict dissemination of information about examinations conducted pursuant to Bankruptcy Rule 205. See BANKRUPTCY RULES AND OFFICIAL BANKRUPTCY FORMS, reprinted in 411 U.S. 989, 1025 (1973); see, e.g., *In re Frigitemp Corp.*, 15 Bankr. 263, 264 (Bankr. S.D.N.Y. 1981). In a more administrative context, state bar disciplinary proceedings are ordinarily confidential, and comment about them is forbidden. See, e.g., ILL. REV. STAT. ch. 110A, § 766 (Supp. 1976); N.Y. JUD. LAW § 90(10) (McKinney 1983); RULES OF PROCEDURE OF THE STATE BAR OF CALIFORNIA 8 (codified following CAL. BUS. & PROF. CODE § 6087 (West 1974)).

<sup>257</sup> 435 U.S. 829 (1978).

<sup>258</sup> Forty-nine states had established similar commissions and all of them provided that their proceedings be confidential. See *id.* at 846-48 app., for a listing of all such rules. The Court apparently was concerned about nullifying this widespread practice. The practice of confidentiality may, however, be changing. See *How Should Judges Be Disciplined?*, Nat'l L.J., Jan. 31, 1983, at 1, col. 4 (stating that 19 states now make public the proceedings of these commissions). Even where efforts are made to keep such proceedings secret, it may be impossible. See *Unfit Justice?*, 69 A.B.A. J. 885 (1983) (noting leaking of sealed records concerning investigation of Justice of Pennsylvania Supreme Court).

<sup>259</sup> See 435 U.S. at 835-36.

<sup>260</sup> See *id.* at 841.

<sup>261</sup> See *id.* at 837 n.10.

<sup>262</sup> See Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 903-04 (1983) (suggesting that restrictions on discussion about cases by petit juries would be upheld); Comment, *First Amendment Standards for Subsequent Punishment of Dissemination of Confidential Government Information*, 68 CALIF. L. REV. 83, 84-85 (1980) (arguing that prior restraints against release of information on governmental hearings generally will be upheld under *Landmark Communications*).

of first amendment interests.<sup>263</sup> Discovery proceedings are no more formal than proceedings before a grand jury or a commission on judicial performance. Surely a civil litigant, particularly a plaintiff, has more to gain by preserving the orderly functioning of the civil discovery system than a grand juror or witness before the judicial competence commission has to gain by the orderly functioning of those bodies. In terms of the weight accorded rule 1 interests and the benefits accruing to the party whose free expression is inhibited, orderly discovery is therefore entitled to significant weight even against first amendment interests.

The privacy rights of persons compelled by judicial process to reveal private information further counterbalance the litigants' first amendment rights. Since *Griswold v. Connecticut*<sup>264</sup> was decided in 1965, courts and commentators have suggested that a constitutional right to privacy may ensure the confidentiality of private information in some circumstances. Indeed, Judge Bazelon himself asserted in a 1977 article that "privacy can be a valuable right that should yield only to a more important interest, and then no more than actually necessary."<sup>265</sup> Although this privacy right is usually advanced in cases involving sensitive personal affairs such as familial relations, some lower courts have said that it applies to protect financial information as well.<sup>266</sup> Commentators have even argued that it justifies keeping public records secret.<sup>267</sup>

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<sup>263</sup> Such interests do not always justify restraints on first amendment rights. Thus, in *In re Express-News Corp.*, 695 F.2d 807, 810 (5th Cir. 1982), the court invalidated a district court local rule forbidding questioning of jurors on the ground that it was not "narrowly tailored to prevent a substantial threat to the administration of justice."

<sup>264</sup> 381 U.S. 479 (1965); see also *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977); *Whalen v. Roe*, 429 U.S. 589 (1977); *Miofsky v. Superior Court*, 703 F.2d 332 (9th Cir. 1983) (suit to enjoin disclosure of information in state court on ground that such disclosure would violate plaintiff's federal right to privacy).

<sup>265</sup> Bazelon, *Probing Privacy*, 12 GONZ. L. REV. 587, 600 (1977). In *Moskowitz v. Superior Court*, 137 Cal. App. 3d 313, 187 Cal. Rptr. 4 (1982), the court adopted essentially the same theory in issuing a protective order covering financial information:

The constitutional right of privacy is not absolute; it may be abridged to accommodate a compelling public interest. One such interest, evidenced by California's broad discovery statutes, is "the historically important state interest of facilitating the ascertainment of truth in connection with legal proceedings." . . . Even where the balance weighs in favor of disclosure of private information, the scope of the disclosure will be narrowly circumscribed; such an invasion of the right of privacy "must be drawn with narrow specificity" and is permitted only to the extent necessary for a fair resolution of the lawsuit.

*Id.* at 316, 187 Cal. Rptr. at 6 (quoting *Britt v. Superior Court*, 20 Cal. 3d 844, 856-57, 574 P.2d 766, 773-74, 143 Cal. Rptr. 695, 702-03 (1978)) (citations omitted).

<sup>266</sup> See, e.g., *Plante v. Gonzalez*, 575 F.2d 1119, 1136 (5th Cir. 1978), cert. denied, 439 U.S. 1129 (1979); *City of Carmel-by-the-Sea v. Young*, 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970); cf. *Valley Bank v. Superior Court*, 15 Cal. 3d 652, 542 P.2d 977, 125 Cal. Rptr. 553 (1975) (privacy rights under California Constitution).

<sup>267</sup> See, e.g., Note, *Sealed Adoption Records and the Constitutional Right of Privacy of the Natural Parent*, 34 RUTGERS L. REV. 451 (1982); Comment, *The Constitutional Right to Withhold Private Information*, 77 NW. U.L. REV. 536 (1982); Case Comment, *A Constitutional Right to Avoid Disclo-*

That rule 26(c) protective orders are intended to protect such privacy interests can be proved by further reference to *Halkin*. The *Halkin* plaintiffs, after defeating the defendants' protective order, filed certain materials they had obtained through discovery in opposition to the defendants' motions for summary judgment. Before filing the materials, however, they obtained a protective order sealing some of those filings to protect their own privacy.<sup>268</sup> Thus, although the extent of this emerging constitutional privacy interest remains unclear, particularly in cases involving noncommercial information, it does provide additional support for the application of protective orders despite the first amendment rights of litigants.

## 2. *The First Amendment Interests of Litigants*

The reality of civil litigation is that it ordinarily serves to resolve private disputes. Consistent with that private purpose, the litigants may use the court's power to extract information from their opponents and bystanders. Also consistent with the private nature of these disputes, there is normally little first amendment interest in further dissemination of the information thus obtained. Accordingly, the first amendment interests of litigants tend to be insignificant.

The most likely interest of the litigant would be to influence the outcome of litigation by disclosing information obtained through discovery, but that desire merits no weight. As the Supreme Court observed forty years ago, "trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."<sup>269</sup> Thus, under federal law it is a crime to picket or parade near a federal court in order to influence either a judge or a jury.<sup>270</sup> The Supreme Court has upheld a state statute modeled on the federal statute against a first amendment challenge because "[t]here can be no question that a State has a legitimate interest in protecting its judicial system from the pres-

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*sure of Personal Matter: Perfecting Privacy Analysis in J.P. v. De Santi*, 71 GEO. L.J. 219 (1982). Many jurisdictions recognize that privacy interests alone may justify limiting common law access to records of divorce proceedings. See Note, *All Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records*, 52 TEMP. L.Q. 331, 332-33 (1979); see also *supra* 134-36 and accompanying text (discussing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978)).

<sup>268</sup> See *Halkin v. Helms*, 690 F.2d 977, 982 n.13 (D.C. Cir. 1982). In their motion seeking a protective order, the plaintiffs stated:

[I]t is now necessary for plaintiffs to file these documents as part of the record in order to substantiate their averment [that the CIA gathered information about them]. Since much of the information in these documents is not publicly available, plaintiffs seek the Court's permission to file the documents under seal in order to minimize any further invasion of plaintiffs' privacy.

Plaintiffs Motion for Leave to File Certain Documents Under Seal at 1-2, *Halkin v. Helms*, No. 75-1773 (D.D.C. 1980) (copy on file at *Cornell Law Review*).

<sup>269</sup> *Bridges v. California*, 314 U.S. 252, 271 (1941).

<sup>270</sup> See 18 U.S.C. § 1507 (1976).



tures which picketing near a courthouse might create."<sup>271</sup> Other expression designed to affect the result of the litigation is not criminal, but there certainly is little first amendment interest in promoting a trial in the newspapers.

Aside from influencing the result, however, the normal litigant's interest in the disclosure of confidential information obtained through discovery hardly implicates substantial first amendment concerns. Consider information designated a trade secret. In a recent case the plaintiff's vice president sought to market the defendant's secret processes through seminars offered for a fee to others in the industry.<sup>272</sup> The information had not only been revealed through discovery, but also disclosed in open court during the trial. The public disclosure at trial led the court to hold that the vice president's entrepreneurial efforts did not constitute contempt despite the protective order covering the information.<sup>273</sup> The interest in such entrepreneurial expression, however, differs materially from that existing in *Halkin*, where the information was "near the heart of the information protected by the First Amendment."<sup>274</sup> Although the commentators have reached no consensus about the first amendment interests in commercial speech,<sup>275</sup> it seems

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<sup>271</sup> *Cox v. Louisiana*, 379 U.S. 559, 562 (1965). The statute was LA. REV. STAT. ANN. § 14.401 (West 1974), which the Court noted was "modeled after a bill pertaining to the federal judiciary . . . 18 U.S.C. § 1507." 379 U.S. at 561. Compare *United States v. Grace*, 103 S. Ct. 1702 (1983), in which the Court invalidated the application of 40 U.S.C. § 13k (1976), which prohibits all demonstrations on the property of the Supreme Court Building, to picketing on the sidewalk unrelated to pending cases. The Court acknowledged the importance of protecting against efforts to pressure the Court by public demonstrations, but held that the statute did not sufficiently serve those purposes. 103 S. Ct. at 1710. In a separate opinion, Justice Marshall argued that § 13k was unconstitutional on its face:

In contrast to 18 U.S.C. § 1507 and the statute upheld in *Cox v. Louisiana*, § 13k is not limited to expressive activities that are intended to interfere with, obstruct, or impede the administration of justice. In *Cox* the Court stressed that a prohibition of expression "unrelated to any judicial proceeding" would raise "entirely different considerations."

103 S. Ct. at 1711-12 (citations omitted).

<sup>272</sup> See *National Polymer Prods., Inc. v. Borg-Warner Corp.*, 641 F.2d 418 (6th Cir. 1981).

<sup>273</sup> See *id.* at 423-24.

<sup>274</sup> *Halkin*, 598 F.2d at 188.

<sup>275</sup> Certain "commercial" speech is afforded less first amendment protection than other forms of speech. Nonetheless, many viewed *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), as a seminal case ushering in an era of full protection for commercial speech. Since then, however, other decisions have raised doubts about this conclusion. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *Friedman v. Rogers*, 440 U.S. 1 (1979); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978) ("We have not discarded the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."). The result is that commentators remain uncertain about the exact contours of existing law. See Note, *Constitutional Protection for Commercial Speech*, 82 COLUM. L. REV. 720 (1982); Comment, *First Amendment Protection for Commercial Speech: An Optical Illusion?*, 31 U. FLA. L. REV. 799 (1979).

clear that the first amendment serves at most a limited function in fostering the dissemination of trade secrets.<sup>276</sup>

Analyzing protective order issues as they relate to litigants who do have special first amendment interests may shed some additional light on the overall influence of the first amendment on dissemination of discovery materials. A first category involving heightened first amendment considerations is litigation involving the press as a litigant. Although the Supreme Court has repeatedly stated that the press has no greater right than the public at large to obtain information,<sup>277</sup> restrictions on the press are particularly offensive to first amendment values. The courts have recognized the special status of the press in protective order disputes. For example, in an action for libel and violation of the securities laws against the financial newspaper *Barron's*, it refused to agree to "the customary pre-trial stipulation and order of confidentiality."<sup>278</sup> The court held that although the plaintiff's showing might have warranted in camera inspection of the documents in the usual case, the first amendment precluded a protective order against *Barron's* because any attempt by the court to determine whether a publication was based on material developed through discovery or independent investigation would itself chill the newspaper's freedom to publish.<sup>279</sup> Even against the press, however, rule 1 interests may sometimes prevail. For example, in a defamation action brought by the president of Mobil Oil Company against the *Washington Post*, *The Post* sought to compel production of documents held by Mobil.<sup>280</sup> To facilitate that process, the court entered an umbrella protective order despite *The Post's* objections. The court rejected *The Post's* argument that Mobil should have to make a particularized showing on each allegedly confidential document at the time of production because that would unduly delay production and involve the court too deeply in the discovery stage.<sup>281</sup>

<sup>276</sup> Cf. *Connick v. Myers*, 103 S. Ct. 1684 (1983). In *Connick*, the Court upheld the firing of a public employee for circulating a questionnaire among coworkers about the performance of their superior. The Court rejected the plaintiff's claim that the first amendment protected her from disciplinary action for circulating the questionnaire because the employee spoke "not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest." *Id.* at 1690. To a limited extent, then, the Court has recognized that there are differing interests in the dissemination of private information.

<sup>277</sup> See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 683-84 (1972). The issue is, therefore, different from the ongoing debate on special first amendment protection for the press's right to gather information. See, e.g., *Bezanon, The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977); *Blanchard, The Institutional Press and its First Amendment Privileges*, 1978 SUP. CT. REV. 225; *Lange, The Speech and Press Clauses*, 23 U.C.L.A. L. REV. 77 (1975). To the extent that one rejects any special concern about limiting the free expression of the press, one lumps the press together with other litigants in protective order disputes.

<sup>278</sup> *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 202 (S.D.N.Y. 1977).

<sup>279</sup> *Id.* at 205; accord *Georgia Gazette Pub. Co. v. Ramsey*, 248 Ga. 528, 284 S.E.2d 386 (1981) (based on Georgia Constitution).

<sup>280</sup> See *Tavoulareas v. Piro*, 93 F.R.D. 24 (D.D.C. 1981).

<sup>281</sup> *Id.* at 29-30. The court reasoned that

[u]nder the circumstances of this case, imposition of the protective order pro-

A second discernable category of persons that have special first amendment interests can be loosely labelled "public interest litigants." The source for this category is a series of cases in which the Supreme Court has indicated that litigation promoted by groups such as the NAACP,<sup>282</sup> the ACLU,<sup>283</sup> or unions<sup>284</sup> may be a protected activity. Consequently, the state has only a very limited power to regulate communications about such litigation by lawyers even though it admittedly has a substantial general interest in regulating the practice of law.<sup>285</sup> *Halkin* invoked the "litigation as expression" concept to justify its narrow reading of the judicial power to enter protective orders.<sup>286</sup> Although the analogy has some force, given the current litigation boom *Halkin's* argument seems questionable and its implicit endorsement of promotion of litigation unsettling. It is not unthinkable that public interest litigants will need to discuss material obtained through discovery to promote their causes. If the state, despite its substantial interest in regulating lawyers, may not prohibit activities by lawyers that have traditionally been regarded as harmful, such as champerty, it is difficult to understand how limitations on expression by nonlawyers can be justified. The Supreme Court has not yet addressed this issue. Assuming arguendo the existence of public interest litigants distinguished by their devotion to a cause rather than to private gain hardly demonstrates, however, that the first amendment interests of most litigants rise to a comparable level. Moreover, even as to public interest litigants, protec-

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posed by Mobil appears to be the only efficient way to handle the enormous volume of material sought by *The Post*. . . . Absent an objection by *The Post*, the Court will be freed of the time-consuming task of ruling on the numerous claims of confidentiality likely to be raised by Mobil.

*Id.* The court did, however, express "the hope that Mobil will use its best efforts and invoke the terms of the protective order only when necessary to protect legitimate confidential matter." *Id.* at 29 n.2. The court modified the protective order on June 21, 1983, to permit disclosure of materials obtained from Mobil. See *Tavoulareas v. Piro*, No. 80-2387 (D.D.C. June 21, 1983) (order modifying protective order), *appeal docketed sub nom. Tavoulareas v. Washington Post Co.*, No. 83-1688 (D.C. Cir. June 23, 1983).

For another case in which the court restrained a newspaper from disclosing material obtained from a defamation plaintiff through discovery, see *Rhinehart v. Seattle Times*, 98 Wash. 2d 226, 654 P.2d 673 (1982), *cert. granted*, 52 U.S.L.W. 3261 (U.S. Oct. 4, 1983) (No. 82-1721). The court rejected the paper's argument that it was entitled to greater immunity from protective orders because it was a newspaper. In *National Enquirer, Inc. v. Superior Court*, *cert. denied*, 103 S. Ct. 3128 (1983), the newspaper claimed that the trial court's protective order forbidding it from publishing information gained during discovery from the plaintiff, actress Shirley Jones, violated the first amendment. For a copy of the trial court's order, see *Petition for Writ of Certiorari*, app. D, *National Enquirer, Inc. v. Superior Court*, No. 67772 (Cal. Ct. App. Mar. 9, 1983), *cert. denied*, 103 S. Ct. 3128 (1983).

<sup>282</sup> See, e.g., *NAACP v. Button*, 371 U.S. 415 (1963).

<sup>283</sup> See, e.g., *In re Primus*, 436 U.S. 412 (1978).

<sup>284</sup> See, e.g., *United Transp. Union v. Michigan Bar*, 401 U.S. 576 (1971).

<sup>285</sup> See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460-62 (1978).

<sup>286</sup> See 598 F.2d at 187.

tive orders are not unknown in Supreme Court litigation.<sup>287</sup>

Very few cases implicate the special first amendment concerns that attend actions involving public interest litigants and the press. The reality, then, is that the interest most litigants have in discussing their litigations, and particularly in disclosing confidential information obtained through discovery, is materially less compelling. One cannot argue, however, that no other types of litigation involve first amendment interests. As suggested in the DC-10 situation discussed in Part III above,<sup>288</sup> discovery may reveal matters that are of legitimate interest to the community at large. In such situations, the first amendment interests of a litigant may begin to resemble those of the public interest litigant or the press regardless of the litigant's original intent concerning disclosure.

In some ways, the most troubling situation involves the retained expert rather than the litigant. Retained experts are usually required to sign affidavits acknowledging that they have read the protective order and agree to be bound by it before they are given material covered by the order.<sup>289</sup> Nonetheless, receiving the protected material may place them in a very difficult position. As one court observed in a pharmaceutical products liability case, "it might well result in a violation of medical ethics if a court were to require an expert acquainted with the hazards or potential hazards of a drug to conceal that knowledge from the public in general or particular patients."<sup>290</sup> The expert witness, however, is not automatically entitled to act as a self-appointed savior. For example, in one early case, the defendants' accountant examined the plaintiff's books under a protective order. He then asserted that his professional duty compelled him to reveal what he had discovered to his other clients. Finding that such an assertion "carries within it the seed

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<sup>287</sup> See *Kerr v. United States Dist. Court*, 426 U.S. 394 (1976). For a discussion of *Kerr*, see *supra* note 148. The problem of class actions also merits discussion. In *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), the Court held that rule 23(d) would not uphold blanket prohibitions on communications between counsel and the putative members of an uncertified class and intimated that any effort to restrict communications between class members could give rise to substantial first amendment problems. See *id.* at 101-02. Somewhat ominously, the court also cited *Halkin*. See *id.* at 102 n.16. The extent of a court's power to limit such communications is still ambiguous. At least one lower court has held that, *Gulf Oil* notwithstanding, it could forbid defense counsel from communicating with the unnamed members of a certified class. See *Resnick v. American Dental Ass'n*, 95 F.R.D. 372, 376 (N.D. Ill. 1982). In the protective order context, the appropriate solution is to bind class members by protective orders just as with other litigants.

<sup>288</sup> See *supra* text accompanying notes 218-20.

<sup>289</sup> See *MANUAL FOR COMPLEX LITIGATION*, pt. II, § 2.50, at 361 (5th ed. 1982). This sample affidavit provides in part: "I understand that any use of information obtained by me from material stamped 'Confidential' or any portions or summaries thereof, in any manner contrary to the provisions of the Protective Order, will subject me to the summary sanctions of this Court for Contempt."

<sup>290</sup> *In re Upjohn Co. Antibiotic Clocin Prods. Liab. Litig.*, 81 F.R.D. 482, 483-84 (E.D. Mich. 1979), *aff'd*, 664 F.2d 114 (6th Cir. 1981).

of abuse,"<sup>291</sup> Judge Weinfeld rejected the professional duty justification for disclosure. Judge Weinfeld's result seems justified. Every professional faces many inherent limitations on his free expression. Lawyers, for example, may not disclose client confidences whether those confidences are of public interest or not.<sup>292</sup> Retained experts are in a similar situation.

The litigants's first amendment interests must still be addressed. These interests will not disappear through a simple process of categorizing cases as "private" or "public," particularly in view of the suggestion that certain kinds of commercial speech are entitled to full first amendment protection.<sup>293</sup> Although the existence of a public interest in discovery material does not compel disclosure,<sup>294</sup> a litigant may, nonetheless, have a substantial interest in dissemination. Accordingly, to state categorically that certain types of cases or litigants do not present important first amendment concerns would be to propagate a new myth about litigation. A litigant's first amendment interests, unlike the expert's professional interests, do not imply any duty to disclose. Thus, in the DC-10 case, the plaintiffs could elect to surrender their right to disclose information as part of the settlement package. Surely first amendment interests are much less important when used as a mere bargaining chip in the settlement process. Indeed, the fact that disclosure of discovered information is often only a bargaining chip suggests that waiver is the solution to the first amendment problem for protective orders.

### 3. *Waiver*

Although an individual can waive the first amendment right to free expression,<sup>295</sup> such waivers are not easily found. Litigants do not waive their right to discuss litigation or discovery merely by initiating it.<sup>296</sup> Accordingly, when, as in *Halkin*, production of information is not conditioned on confidentiality, the courts properly shun waiver as a solution to the first amendment problem. Legitimate waiver arguments exist, however, when a protective order is entered before disclosure.

Consent to the entry of a protective order should preclude a party from subsequently disclosing the information. Even *Halkin* suggests that

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<sup>291</sup> *Baim & Blank, Inc. v. Bruno-New York, Inc.*, 17 F.R.D. 346, 348 (S.D.N.Y. 1955); see also *Quinter v. Volkswagen of Am.*, 676 F.2d 969 (3d Cir. 1982) (upholding contempt finding against expert who disclosed material under protective order to counsel who retained him to assist in preparation of another litigation against same defendant).

<sup>292</sup> See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1980).

<sup>293</sup> See *supra* note 275.

<sup>294</sup> See *supra* notes 210-14 and accompanying text.

<sup>295</sup> See *Snepp v. United States*, 444 U.S. 507 (1980) (contractual waiver of right to publish sensitive material acquired during CIA employment).

<sup>296</sup> See *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1006-07 (3d Cir. 1976); see also *Moskowitz v. Superior Court*, 137 Cal. App. 3d 313, 187 Cal. Rptr. 4 (1982) (commencement of lawsuit not waiver of right to privacy).

a party in such a situation may lack standing to challenge the protective order.<sup>297</sup> Other courts have held such stipulations sufficient to warrant a finding that the litigant has waived his first amendment rights.<sup>298</sup> This conclusion is inescapable even though these cases do not involve judicial determinations of confidentiality.<sup>299</sup> A person may waive a constitutional right if he does so voluntarily and intelligently;<sup>300</sup> there is no requirement that he receive a quid pro quo for his waiver. Indeed, a person can waive certain constitutional rights, such as the right to a jury trial, by procedural oversight.<sup>301</sup> Negotiated protective orders appear to be archetypal waivers. They are intelligent because they result from consultations between client and lawyer and voluntary because the party seeking discovery has no duty to consent to them. Moreover, the protective orders do represent a quid pro quo. Protective orders save the litigant seeking production of confidential information the time and money that discovery disputes would entail and ensure that he will receive information that a court might otherwise decline to order produced. Hence, courts should hold that litigants who consent to a protective order have waived their first amendment interest in future disclosure.

The more difficult problem arises when the party refuses to stipulate to a protective order. Such refusal imposes on the parties and the court the burden of preliminary litigation over the propriety of protection because such orders do not issue automatically. If the producing party persuades the court to enter a protective order, however, the party seeking discovery receives confidential information subject to restrictions to which he has not voluntarily assented. Can courts find a waiver

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<sup>297</sup> See 598 F.2d at 190 n.27.

<sup>298</sup> See, e.g., *National Polymer Prods. Co. v. Borg-Warner Corp.*, 641 F.2d 418, 423 (6th Cir. 1981) (waiver limited to pretrial disclosure); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 887 (E.D. Pa. 1981) (by agreeing to pretrial confidentiality order, party waived right to obtain declassification of classified documents).

<sup>299</sup> The ordinary order merely permits designation as confidential and does not involve a finding of confidentiality. See *supra* note 45.

<sup>300</sup> See *Snepp v. United States*, 444 U.S. 507 (1980) (holding that CIA may require person to waive his right to disclose information obtained during employment in return for "privilege" of employment); see also *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (waiver must be made with knowledge and intent). Although *Johnson v. Zerbst* involved waiver of sixth amendment rights, courts have applied the waiver formulation set forth therein to alleged waivers of first amendment rights in connection with protective orders. See, e.g., *National Polymer Prods. Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 424-25 (6th Cir. 1981); *In re Halkin*, 598 F.2d 176, 189 (D.C. Cir. 1979); *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1007 n.14 (3d Cir. 1976). For criticism of the Court's handling of the waiver issue, see Meadow, *The First Amendment and the Secrecy State*: *Snepp v. United States*, 130 U. PA. L. REV. 775, 811-14 (1982).

<sup>301</sup> See FED. R. CIV. P. 38(b). Rule 38(b) requires a demand for jury trial within 10 days after service of the last pleading directed to the issue. If no demand is made within the 10-day period, the right is waived and the party must petition the court to use its discretion under rule 39(b) to obtain a jury trial.

under these circumstances? Again, a choice is presented—the party seeking discovery may refuse to accept the terms of the order and decline production of the information subject to its terms. A quid pro quo also exists in this case—if the party does go forward with discovery of the confidential information, he obtains information that the court probably would not otherwise have given to him. Thus, the party should be bound by the limiting condition of the order that gave him access to information he could not otherwise have obtained.

The difficulty with this reasoning is that it allows a court to condition discovery on the waiver of a constitutional right, thereby disinterring the late nineteenth-century notion that a government may condition a “privilege” in any manner it chooses.<sup>302</sup> Indeed, Judge Bazelon attacked the waiver argument on precisely that ground in *Halkin*.<sup>303</sup> For years commentators have inveighed against the right-privilege distinction,<sup>304</sup> and the Supreme Court has announced its demise.<sup>305</sup> The prospect that protective order litigation may become enmeshed in this debate is extremely troubling. Although it is beyond the scope of this article to enter that fray, a review of the debate suggests that it should not undermine the waiver approach.

Despite protestations to the contrary, the concept that government may exact a price for certain benefits refuses to die. As one commentator recently stated, the Court has evinced a “schizophrenic tendency . . . to simultaneously disclaim the doctrine by name and resort to the concept in practice . . . .”<sup>306</sup> Others have persuasively shown that the primary difficulty with the doctrine is that it merely states the problem without offering a reasoned basis for deciding whether a given condition

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<sup>302</sup> The idea originated in *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892), in which a policeman discharged for political activity challenged his dismissal on the ground that he had a constitutional right to engage in such activity. Speaking for the Massachusetts court, Oliver Wendell Holmes disposed of this claim with an oft-cited aphorism: “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” *Id.* at 220, 29 N.E. at 517.

Lest such a colorful characterization of the issue be thought dead, consider *Arnett v. Kennedy*, 416 U.S. 134 (1974), where the Court rejected challenges to the procedures for discharge of federal civil service employees. In his plurality opinion, Justice Rehnquist explained that “where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet.” *Id.* at 153-54. Although the majority rejected this articulation, the basic argument seems to have prevailed two years later in *Bishop v. Wood*, 426 U.S. 341 (1976).

<sup>303</sup> See 598 F.2d at 190 (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)); accord *In re San Juan Star Co.*, 662 F.2d 108, 114 (1st Cir. 1981).

<sup>304</sup> The best known attack is Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

<sup>305</sup> See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

<sup>306</sup> Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69, 70 (1982).

should be held valid or invalid.<sup>307</sup> Mere categorization does not suffice. In 1976, for example, the Supreme Court upheld the provision of the Federal Election Campaign Act of 1971<sup>308</sup> that required a candidate who accepted federal campaign funding to surrender his right to spend more than a specified amount on campaign advertising.<sup>309</sup> More significantly, in *Snepp v. United States*,<sup>310</sup> the Court essentially held that, in return for the "privilege" of employment by the CIA, the CIA may require a person to waive his right to disclose information obtained during his employment.<sup>311</sup> The Court justified its holding by emphasizing the strong interest in secrecy in surveillance matters.<sup>312</sup> Thus, the validity of the restraint depends not upon categorization of the restraint as a "condition" attached to a "privilege," but rather upon whether the interest served by the restraint is sufficient to justify it.<sup>313</sup>

Under this analysis, the right-privilege debate should not undermine the waiver approach proposed here. It is difficult to argue that stipulated protective orders even fit the unconstitutional-condition

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<sup>307</sup> For a penetrating demonstration that the use of such labels serves to mask rather than answer the question, see Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 IOWA L. REV. 741, 747-48 (1981).

<sup>308</sup> 2 U.S.C. §§ 431-56 (1982).

<sup>309</sup> See *Buckley v. Valeo*, 424 U.S. 1, 95 (1976) ("[A]cceptance of public financing entails voluntary acceptance of an expenditure ceiling."). Courts have employed similar reasoning with respect to the privacy interests of those who enter public life. See, e.g., *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 455 (1977) ("Appellant concedes that when he entered public life he voluntarily surrendered the privacy secured by law for those who elect not to place themselves in the public spotlight."); *Plante v. Gonzalez*, 575 F.2d 1119, 1135-36 (5th Cir. 1978) (by entering public life, plaintiffs relinquished some of their interest in financial privacy), *cert. denied*, 439 U.S. 1129 (1979). Indeed, one commentator has observed that "I am not sure there is a 'doctrine' of unconstitutional conditions after *Buckley v. Valeo*." Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 348 (emphasis in original).

<sup>310</sup> 444 U.S. 507 (1980).

<sup>311</sup> When he accepted his job with the CIA, Snepp signed an agreement requiring him to obtain advance approval from the Agency before writing about his experiences or of information obtained during the course of employment. In enforcing that pledge, the Court emphasized the relationship of trust created under the agreement. See *id.* at 510-13. In view of this relationship of trust, the Court held that it was insignificant that the CIA had not alleged that Snepp had, in fact, published classified material. See *id.* at 511. The Court found that his failure to submit his manuscript for pre-publication review alone justified imposition of a constructive trust on his profits. *Id.* at 512. The Court adopted the constructive trust remedy in part because, being "swift and sure, it is tailored to deter those who would place sensitive information at risk." *Id.* at 515. Although it did not order prior judicial restraint, the Court's ruling had the same practical effect. See also *United States v. Marchetti*, 466 F.2d 1309 (4th Cir.) (upholding order enjoining publication of classified materials), *cert. denied*, 409 U.S. 1063 (1972). In a subsequent opinion after remand, the Fourth Circuit held that Marchetti, by signing the secrecy agreement, "effectively relinquished his First Amendment rights." *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975).

<sup>312</sup> 444 U.S. at 511-13. The effect to be given to these interests, and their applicability on the facts of *Snepp*, are hard questions that need not be addressed here. For a criticism of the Court's handling of the waiver issue, see Meadow, *supra* note 300, at 811-14.

<sup>313</sup> For an articulation of this approach to the problem, see Westen, *supra* note 307, at 747-52.



model. The context is the judicial discovery apparatus, but it seems more accurate to say that the government, through the courts, is enforcing the parties' agreement than to say that it is conditioning access to discovery on waiver of first amendment rights. It is, after all, the party producing the information who is conditioning the waiver of his right to resist the discovery on the entry of the order. Thus, in some sense stipulated protective orders do not involve governmentally imposed conditions at all.

Where the parties have not agreed to a stipulation, the court is conditioning discovery on a restraint, but that does not mean that the condition is unjustified. From a procedural standpoint, the requirement that the party seeking the protective order make a showing justifying restraint, and the opportunity afforded the party potentially subject to the protective order to oppose the motion, ensure a thorough and proper airing of the question of whether the restraint is justified. The litigant seeking discovery is certainly in a better position to contest the restraint than the prospective CIA agent presented with a "take it or leave it" employment package by his future employer. Thus, the procedural requirements ensure that a substantial justification exists for every order entered. Furthermore, the rule 1 and privacy interests protected by the entry of a protective order are entitled to considerable weight as against first amendment interests, particularly the relatively weak interests of most litigants. Indeed, with respect to the systemic interests underlying rule 1, the restrained litigant himself has a stake in facilitating the orderly operation of the judicial system. Accordingly, even though a protective order entered after a contested hearing on the basis of a showing of good cause may be categorized as a condition on a privilege, it is justified and the litigant seeking the confidential information is rightly put to his choice.<sup>314</sup>

Adopting the waiver approach does not suggest that courts must automatically deny litigants the right to disseminate any information obtained through discovery. To the contrary, the waiver approach obviates the risk that litigants who have obtained information on the condition of secrecy may later claim that they have an absolute right to disseminate the information despite that prior condition. The waiver theory thus permits a court presented with a motion for leave to disclose material covered by the order to give proper consideration to rule 1 interests. The need for public access to information having a substantial public interest, such as the design information in the DC-10 situation,<sup>315</sup>

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<sup>314</sup> Different considerations pertain where, as in *Halkin*, the court enters the protective order *after* production of the material. In that situation, the recipient has no opportunity to make the choice upon which the waiver argument is based. Without a predisclosure opportunity to forego receipt of the material, such a party is subject to the chilling effects of a protective order, a consequence that raises more serious first amendment concerns.

<sup>315</sup> See *supra* text accompanying notes 218-20.

or the medical expert who learns the hazards of a drug,<sup>316</sup> is best determined by a court after consideration of the importance of the information to the public and the confidentiality interests of the party resisting disclosure. A court then can evaluate the potential disruption that may result from modifying the protective order in much the same way as when a nonparty seeks access to discovery information for use in another litigation.

### CONCLUSION

This article proposes to avert rather than cause a revolution. Particularly in complex cases, the reality is that courts have used protective orders flexibly to facilitate disclosure of information needed to prepare for trial while protecting against extra-judicial use of such information. The cases articulating a broad public right of access entirely disregard this reality, however, and thereby threaten to undermine it. This article has demonstrated that the premises underlying the public access approach are unsound and based largely on myth. The public does not have access to discovery proceedings, or to their fruits, and recent decisions concerning public access to criminal trials supply no basis for concluding that the existing confidentiality of civil discovery violates the first amendment or the common law right of access to trials. No legal support exists for upsetting the reality to permit wider public dissemination of discovery materials. Rather, the courts should limit nonparty access to materials subject to a protective order to those cases in which one of the following special justifications is present: (1) the information is needed as evidence in other litigation; (2) the information formed the basis of a pretrial ruling on the merits and access is necessary to permit evaluation of that ruling; or (3) in extremely rare cases, the subject of the litigation is alleged governmental misconduct, and there is a strong public interest in access. Admittedly, the first two circumstances may exist in many cases. When these circumstances arise, the court must balance the desire for access against rule 1 interests to protect the judicial system in a way not possible when courts treat the matter as a question of constitutional right based on the myth of public access.

Rejecting the myth of public access will remove many of the most objectionable consequences of the first amendment analysis by eliminating the notion that information produced through discovery becomes part of the public domain. Nonetheless, an expansive view of the first amendment rights of the litigants, which permits a party who has received material subject to limitations to challenge a protective order later on the ground that the order did not comply with *Halkin's* elabo-

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<sup>316</sup> See *supra* text accompanying notes 289-92.

rate proof and findings procedure, will also undermine the reality and render protective orders unreliable.

*Halkin's* overblown first amendment analysis derives partly from the erroneous conclusion that the parties may use discovery material for any purpose, absent a protective order, merely because the Federal Rules do not specifically limit the dissemination. In reality, lawyers and judges assume that the litigants should use the material obtained through discovery only for preparation for litigation, even when the court has not entered a protective order. Authority holding that a court may deny discovery if the material is sought for some purpose other than trial preparation confirms this assumption. Rebutting this myth does not, however, solve the problem of the first amendment rights of the parties. Although parties to civil litigation will rarely have substantial first amendment interests in disseminating information obtained through discovery, some such cases do arise. To protect parties who rely on protective orders, this article proposes that courts should employ a broad waiver doctrine to eliminate the first amendment issue in any case in which a party has stipulated to entry of a protective order or obtained production of information subject to a court-imposed protective order entered after a finding of good cause. This reasonable solution may, unfortunately, become enmeshed in the morass of the right-privilege debate that has raged for years.

Efforts to improve the efficiency and speed of federal civil litigation through amendments to the Federal Rules of Civil Procedure and increased case management by individual judges are likely to continue. It would be ironic to undermine these efforts on the basis of newly discovered first amendment limitations on protective order practices. Recent Supreme Court decisions rejecting first amendment arguments for access to information about governmental activities carried on behind prison walls and authorizing the government to require job applicants to waive their first amendment rights as the price for a governmental job serve only to heighten the potential irony. Although one may legitimately question these restrictive attitudes toward free expression on a variety of grounds,<sup>317</sup> situations in which first amendment interests have

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<sup>317</sup> For example, the government, seemingly emboldened by its success in *Snepp*, has expanded its reliance on such waivers. Thus, the *New York Times* reported that the government will, in the future, require that a much larger number of federal employees sign *Snepp*-type agreements. See *Stiff Curb Sought on Leaks of Data*, N.Y. Times, Apr. 21, 1983, at A1, col. 5; *President Orders Curbs in Handling of Classified Data*, N.Y. Times, Mar. 12, 1983, at A1, col. 4. Similarly, the Department of Defense asked reporters to sign a secrecy agreement that they would not disclose the information provided at a briefing on Soviet military capabilities as a condition for attending the briefing. See *Reporters Balk at Secrecy Pledge*, N.Y. Times, Dec. 15, 1982, at A17, col. 1. Although the "off the record" device has existed for decades, it is quite ominous for the government to try to put such commitments in a legally enforceable form. Such developments surely pose greater threats to first amendment interests than do protective orders in civil litigation.

been abrogated implicate interests far more significant than a private litigant's interest in the dissemination of material obtained through discovery from another private litigant. Present protective order practice very effectively furthers the rule 1 interests that motivated the recent amendments to the Federal Rules of Civil Procedure.<sup>318</sup> This practice is worth preserving as one means by which to reduce the current unconscionable expense and delay in civil litigation. Only time will tell, however, whether myth or reality will prevail.

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<sup>318</sup> See *supra* note 31.